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Fourth Amendment Federalism? The Court's Vacillating Mistrust and Trust of State Search and Seizure Laws

Kathryn R. Urbonya[*]

The word "federalism" conveys many different ideas, a term broad enough to encompass the odd phrase "Fourth Amendment federalism." The United States Supreme Court's Fourth Amendment jurisprudence has suggested a peculiar interest in deferring to modern state search and seizure laws when determining what constitutes a reasonable police practice. Under this idea of "federalism," the Court has viewed current state laws as a source to define the scope of the Fourth Amendment. This interweaving of state practices with federal protections raises important federalism questions, particularly when the context involves criminal law enforcement. State legislators during their campaigns have often promised to strongly support law enforcement interests, with little interest in promising to repeal criminal laws that infringe current contemporary values. In addition, some state court judges today may similarly campaign to preserve law enforcement powers in light of the Court's recent acknowledgment of their new freedom to publicly discuss controversial issues. As a result, the Court's deference to state search and seizure practices may fail to safeguard a politically unpopular group—alleged criminals.

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When police officers search and seize individuals, they may face questioning in court about whether their actions violated the Fourth Amendment to the United States Constitution[1] and state law. When deciding whether they crossed the federal constitutional line, the United States Supreme Court has considered state search and seizure practices at the time of the Fourth Amendment's enactment and current state practices. Understandably, the Court has cited early state practices to characterize what the Framers of the Constitution may have intended the scope of the Fourth Amendment to be. When interpreting the Fourth Amendment, the Court has both trusted and mistrusted modern state policing policies; sometimes the Court has declared them unconstitutional, and at other times, the Court has used them oddly as a source in defining the scope of federal protection.

When the Court selectively (and extensively) incorporated the Bill of Rights by its construction of the Due Process Clause of the Fourteenth Amendment, it declared that federal procedural

[1] U.S. CONST. amend. IV.

safeguards applied to states' criminal proceedings.[2] The Warren Court continued to expand this federal presence by broadly construing the Fourth Amendment,[3] only to be later checked by the Burger and Rehnquist Courts, who constructed doctrines narrowing protections for criminal defendants.[4] In addition, the Burger and Rehnquist Courts explicitly noted that state courts could interpret their state constitutions to provide greater protection to criminal defendants.[5] They also informed states that if they grant broader rights, their highest state courts may shield their judgments from review by the Supreme Court, but only if they clearly specify that the greater protection arises from state law, not federal law. As a result, state courts gradually began interpreting their constitutions to grant greater protection for criminal defendants subject to searches and seizures.[6] In 2004, twenty-eight states have rejected a particular

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[2] *See, e.g.*, David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Judicial Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J. CONST. L. 367, 368 (2001).

[3] *See, e.g.*, Stewart F. Hancock, Jr., *The State Constitution: A Criminal Lawyer's First Line of Defense*, 57 ALB. L. REV. 271, 279 (1993) ("During the Warren Court era, federal courts suddenly assumed the leading role as protectors of the people from intrusions by state and local governments. . . . In many states, the Federal Constitutional decisions were more protective than the state decisions, and thus in those states, criminal cases were decided on federal grounds.").

[4] *See, e.g.*, James A. Gardner, *State Courts as Agents of Federalism: Power and Interpretation in State Constitutional Law*, 44 WM. & MARY L. REV. 1725, 1782 & n.215 (2003) (declaring that the "United States Supreme Court has decisively halted the expansion of federal protection of individual rights," with "[t]his process . . . most notable in the decisions concerning the Fourth Amendment"); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1358 (2002) ("Instead of overruling Warren Court precedents it deemed to be erroneous, the Rehnquist Court has distinguished, created exceptions to, and reinterpreted such precedents. . . . Whatever else might be said about the Court's approach, it was highly effective in producing the 'law and order' results Nixon and Reagan promised to deliver.").

[5] *See, e.g.*, Nina Morrison, *Curing "Constitutional Amnesia": Criminal Procedure under State Constitutions*, 73 N.Y.U. L. REV. 880, 881 (1998) (noting that "the movement towards independent state constitutional analysis—known colloquially as 'New Federalism'—did not gather steam until 1977, when Justice Brennan called on state courts to 'step into the breach' left by the Burger Court's rights-narrowing jurisprudence" (citing William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977))). *See generally* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1029-30 (2003) (noting that "[n]ineteen state constitutions contain a Warrant Clause identical to that found in the Fourth Amendment"; but contending that there may be a "significant potential difference[]between state and federal versions of protected rights: state constitutions may offer a level of protection for such liberties that exceeds the level of protection by the U.S. Constitution").

[6] *See generally* Harris, *supra* note 2, at 368 ("An effort began—'movement' may be too strong a word—to keep alive the Warren Court's legacy of expanded

Fourth Amendment doctrine and have declared broader protection under state law.[7]

The significance of modern state search and seizure practices, however, evades easy characterization. For example, sometimes the Court has supported its Fourth Amendment reasonableness determination by indicating that a majority of states currently engage in the particular practice.[8] At other times, the Court has characterized the practice of a minority of states as indicating a "trend,"[9] one that harmonized with the Court's reasonableness conclusion. And sometimes modern state practices play no role because the Court has constructed its decision by either expanding or narrowing precedent.[10] In addition, the Court recently described a special role for state laws: they may create a legal obligation for suspects to identify themselves during an investigative stop, even though the Fourth Amendment does not itself create this requirement.[11] Although states have historically had the power to define what actions constitute a state criminal offense,[12] the Court's

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constitutional protections for the criminally accused by utilizing state constitutional provisions.").

[7] *See infra* note 353. *See generally* James N.G. Cauthen, *Expanding Rights Under State Constitutions: A Quantitative Appraisal*, 63 ALB. L. REV. 1183, 1197 (2000) ("Retractions of rights by the Supreme Court . . . may explain the high level of state constitutional policymaking in the search and seizure areas. Between 1967 and 1984, the Supreme Court carved out numerous exceptions to the warrant requirement of the Fourth Amendment, thereby reducing the level of available federal protections.").

[8] *See infra* Part III.A.1, text accompanying notes 161-71, and Part III.A.3.

[9] *See infra* text accompanying notes 283 & 298-321.

[10] *See, e.g.*, Thornton v. United States, 541 U.S. 615, 617 (2004) (concluding that New York v. Belton, 453 U.S. 454 (1981) "governs even when an officer does not make contact until the person arrested has left the vehicle"); Illinois v. Lidster, 540 U.S. 419, 423-27 (2004) (distinguishing an "information-seeking" roadblock from other roadblock cases and applying three factors for balancing established in Brown v. Texas, 443 U.S. 47 (1979)); United States v. Banks, 540 U.S. 31, 35-40 (2003) (upholding officers' forcible home entry, made fifteen to twenty seconds after knocking and announcing their warrant authority, because cited Fourth Amendment precedent required case-by-case analysis); Knowles v. Iowa, 525 U.S. 113, 118-19 (1998) (refusing "to extend" the "bright-line rule" of United States v. Robinson, 414 U.S. 218 (1973), to a vehicle search incident to a traffic citation); Maryland v. Wilson, 519 U.S. 408, 410 (1997) (extending the rule of Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam), to allow officer to order passenger of lawfully stopped car out of vehicle).

[11] *See infra* text accompanying notes 243-72.

[12] *See, e.g.*, Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 494 (2004) (positing that when the Supreme Court in Lawrence v. Texas, 539 U.S. 558 (2003), struck down Texas' criminal statute banning same-sex sodomy, it "reject[ed] the view of the police power as unlimited and plenary," contending that the statute interfered with an individual's "rightful exercise of liberty"). By

decisions reflect its more modern trust of state search and seizure law.

This interweaving of state practices with federal protections raises important federalism questions,[13] particularly when the context involves criminal law enforcement, because rarely do state legislators or state politicians campaign for more measures to protect alleged or convicted criminals.[14] In addition, the politics of state court judges may become a more prominent issue after the Court's decision to strike down a provision that limited state-elected judges from vigorous campaigning.[15]

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contrast, when the Court declared that Congress lacked authority under the Commerce Clause to enact the Gun-Free School Zone Act of 1990, a criminal law, it emphasized "first principles," which included a "healthy balance of power between the States and the Federal Government . . . ." United States v. Lopez, 514 U.S. 549, 552 (1995). Justice Kennedy in his concurrence noted that more than "40 states [had] criminal laws outlawing the possession of firearms on or near school grounds." *Id.* at 581 (Kennedy, J., concurring).

[13] For example, the Court extensively looked to legal sources outside the United States Constitution when it held that a Texas statute violated the substantive due process component of the Fourteenth Amendment because it criminalized same-sex sodomy, overruling its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Lawrence v. Texas, 539 U.S. 558, 578 (2003). The *Lawrence* Court noted that five states had "declined to follow [*Bowers*] in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment." *Id.* at 576.

[14] *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 315-16 (2002). In striking down the death penalty as applied to mentally retarded offenders, the *Atkins* Court noted the historic difficulty of passing legislation protecting criminals:

> Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.

Id. *See also* Tennessee v. Lane, 541 U.S. 509, 535 & n.2 (2004) (Souter, J., concurring) (noting that some state eugenics laws enacted in the 1920s still "persist to this day").

[15] Republican Party of Minnesota v. White, 536 U.S. 765, 785-88 (2002) (holding that state statute that barred judicial candidates from announcing views on "disputed legal and political issues" violated the First Amendment). Justice O'Connor in her concurrence cited numerous articles indicating that some judicial elections influence a judge's decision whether to impose the death penalty. *Id.* at 789-90 (O'Connor, J., concurring) (citations omitted). *See* Erwin Chemerinsky, *Judicial Elections and the First Amendment*, TRIAL, Nov. 2002, at 78 (stating that "*White* will dramatically change the nature of speech in judicial elections"). Professor Chemerinksy questioned whether the *White* decision created a feasible distinction between "expressing views about disputed legal or political issues and making statements that appear to commit them with respect to those issues." *Id.* at 81 (questioning the difference between "I believe that *Roe* was wrongly decided and should be overruled" and "I believe that *Roe* was wrongly decided and, if presented with the opportunity, I would vote to overturn the

This Article examines the Court's interest in modern state laws as an aid in assessing Fourth Amendment reasonableness. Part I highlights the Court's mistrust of state criminal search and seizure procedures when it declared that the Due Process Clause of the Fourteenth Amendment incorporated the Fourth Amendment and its exclusionary rule; this incorporation—arising from the Court's constructions of "liberty"—thus compelled states to conform their procedures and practices to the Fourth Amendment. This section recalls the Court's distrust of state criminal practices and the fundamental nature of due process protections for accused. Part II examines the Court's declared jurisdictional need to safeguard federal interpretive turf. It discusses the Court's creation of a "plain statement" requirement in 1983 to rebut a presumption for federal jurisdiction in state-court cases deciding an issue on both federal and state grounds. Under this requirement, state courts may avoid having the United States Supreme Court review their decisions only if they clearly state that their more protective decisions rested on independent and adequate state grounds, not the Fourth Amendment. This section reveals the Court's drawing a sharp line between federal and state interpretative powers. By contrast, Part III examines the Court's selective use of modern state practices to assess Fourth Amendment reasonableness; it discusses the Court's use of modern state practices to both expand and narrow the protections provided by the Fourth Amendment.

The Article concludes that the Court has, at times, constructed the Fourth Amendment with a fragile floor and with an implicit understanding that individuals who seek greater protection of their liberty, privacy, and personal security need to look to state laws. Instead of considering the political unlikelihood of state legislatures passing laws to safeguard an alleged criminal's interest in liberty or of elected state judges interpreting state laws to suppress evidence of guilt, the Court has looked to the states to aid it in assessing its

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decision") (internal quotation marks omitted). *See also* Roy A. Schotland, Republican Party of Minnesota v. White: *Should Judges Be More Like Politicians?*, JUDGES' J., Summer 2002, at 7, 10 (stating that "the impact of elections on judicial independence is amplified because so many states have such short terms for judges" and wondering whether "more states will end judicial contestable elections altogether"); Stephanie Francis Ward, *Judging the Judge Candidates: Queries About Family Life, Religion Draw Fire in Florida County*, A.B.A. J. E-Report, Jan. 23, 2004, WL 3 No. 3 ABAJEREP 3 (noting that Florida's governor-appointed group asked judicial candidates "how they would rule on certain matters, such as sodomy and displaying the Ten Commandments in the courtroom"); Molly McDonough, *Judges Opine on the Issues: Debate May Be Future of Judicial Campaigns*, A.B.A. J. E-Report, May 23, 2003, WL 2 No. 20 ABAJEREP 3 (noting that prospective candidates for Pennsylvania Supreme Court positions were asked "to state their positions on abortion, gun control and tort reform").

independent federal duty to define the right to liberty, privacy, and personal security as safeguarded by the Fourth Amendment. This interpretive practice is odd, but revealing. It ultimately suggests that the Fourth Amendment has an evolving standard, one resembling the evolving standard for other provisions safeguarding liberty, personal security, and privacy.[16] Ultimately, the Court does define the federal

[16] As with its Fourth Amendment jurisprudence, the Court has selectively cited state practices to support its constitutional determination in other contexts. For example, the Court has considered state practices in assessing the application of the death penalty, but not sentencing, under the Eighth Amendment. *Compare* Atkins v. Virginia, 536 U.S. 304, 311 (2002) ("A claim that punishment is excessive is judged not by the standards that presided . . . over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."), *with* Ewing v. California, 538 U.S. 11, 24-28 (2003) (noting the rarity of successful challenges to state sentencing schemes). The dissent in *Ewing*, while agreeing with the standard, argued that the California three-strikes law imposed a harsh penalty that would not have been imposed by "[t]hirty-three jurisdictions, as well the federal courts." *Id.* at 53 app. (Breyer, J., dissenting).

Similarly, the Court has selectively invoked state practices when assessing the protection provided by the substantive due process component of the Fourteenth Amendment. *Compare* Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("In all events we think that our laws and traditions in the past half century are of most relevance" in analyzing the constitutionality of a criminal statute banning same-sex sodomy), *with* Roe v. Wade, 410 U.S. 113, 140 (1973) (although characterizing modern practices as revealing a "trend toward liberalization of abortion statutes . . . by about one-third of the States," admitting that the majority of states currently do not support abortion, a position contrary to the "common law, at the time of the adoption of the Constitution, and throughout the major portion of the 19th century"). By contrast, when creating a national standard for measuring whether a punitive damages award violated the substantive due process component of the Fourteenth Amendment, the Court never mentioned the standards of other states. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422 (2003) ("A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.").

The Court's selective interest in state practices is also evidenced in its equal protection cases. *Compare* Loving v. Virginia, 388 U.S. 1, 6 & n.5, 11-12 (1967) (invalidating state statutes banning and punishing interracial marriage on both equal protection and substantive due process grounds and noting that during the previous "15 years, 14 States ha[d] repealed laws outlawing interracial marriages" and that only sixteen states currently prohibited interracial marriage), *with* Grutter v. Bollinger, 539 U.S. 306, 342 (2003) (allowing race as a factor in law school admissions while noting that state laws in "California, Florida, and Washington" ban universities from considering an applicant's race and noting that states "'may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear'" (quoting United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring))). *See generally* Brown v. Bd. of Educ., 347 U.S. 483, 492-93, 495 (1954) (in declaring that "separate but equal" schools based on race violated the Equal Protection Clause, not citing current state practices, but instead focusing on the role of modern education and stating that "we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when

standard, but one today built on a general trust, not mistrust, of states to balance the need for intrusion against a person's and society's interest in liberty, privacy, and personal security. In time, with the Court's interest in counting how many states allow or forbid various practices, states may become the ultimate protectors of liberty.

The Court's interest in state laws, created by a separate sovereign, resembles the interest of some state courts that also consider the practices of other states. At times state courts have cited other state constitutions to justify their interpretation of their particular constitution.[17] State constitutional law scholar Alan Tarr has described a state's interest in other states as "horizontal federalism."[18] This type of federalism resembles the Supreme Court's interest in state practices: a court, whether the United States Supreme Court or a state court, interprets its sovereign's constitution, and neither must consider the other sovereign's interpretation. Nonetheless, to give substance to the text of their respective constitutions, these courts at times have looked outside their

Plessy v. Ferguson was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation.").

[17] *See, e.g.*, People v. Goldson, 682 N.W.2d 479, 489 n.10 (Mich. 2004). In *Goldson*, the Michigan Supreme Court decided that the state constitution did contain an objective good faith exception to the exclusionary rule, which allowed officials to prove guilt by using illegally seized evidence. *Id.* at 489. In making this state constitutional law determination, the state court created a good faith exception like the one established by the United States Supreme Court under the Fourth Amendment. *See infra* note 93. The state court recognized its separate sovereignty: "In interpreting our Constitution, we are not bound by the United States Supreme Court's interpretation of the United States Constitution, even where the language is identical." *Id.* at 484-85. Nonetheless, the majority opinion rhetorically justified its interpretation of the Michigan constitution by citing interpretations of other state constitutions and state statutes, even though it declared them to be "entirely irrelevant to [its] constitutional analysis." *Id.* at 489 n.10. The majority noted that eleven state constitutions as well as the District of Columbia had a good faith exception and five other states had a statutory good faith provision. *Id.* (citing the state constitution interpretations by courts in Alabama, California, Florida, Kentucky, Louisiana, Maryland, Missouri, Ohio, South Dakota, Virginia, and Wisconsin, and citing state statutory provisions for Arizona, Colorado, Illinois, Indiana, and Texas). Similarly, the dissent in *Goldson* listed the state constitutional or statutory interpretations of fourteen other states that had rejected an objective good faith exception. *Id.* at 499 n.26 (Cavanagh, J., dissenting) (citing Connecticut, Delaware, Georgia, Idaho, Massachusetts, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Pennsylvania, South Carolina, and Vermont).

[18] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 50-52, 98-99 (1998). In contrast to horizontal federalism is a state's practice of declaring its own constitution to mirror the federal constitution, known as a "lockstep" interpretation. *See, e.g.*, Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Locksteppingʔ*, 46 WM. & MARY L. REV. 1499, 1502 (2005) (noting that in "a clear majority of cases" state courts have "decide[d] to *follow*, rather than *diverge from*, federal constitutional doctrine").

document for guidance. In the end, the Supreme Court and state courts render decisions under the authority of their sovereign's constitution, but when the Supreme Court looks to modern state laws to interpret the Fourth Amendment, it should not fail to scrutinize current state laws affecting an extremely unpopular minority—criminal defendants, a group unlikely to be vigorously protected by state legislators or elected state judges.

I. MISTRUSTING STATES' PROCEDURES AND PRACTICES: THE INCORPORATION OF THE FOURTH AMENDMENT AND THE COURT'S EXCLUSIONARY RULE

By declaring that the first ten amendments to the United States Constitution (the "Bill of Rights") applied only to the federal government and not to the states, the Court, in an 1833 decision, drew a sharp line between limits placed on federal authority and state authority.[19] Although this line suggested a sharp distinction between restraints imposed on the federal government and the states, in time the doctrine of "selective incorporation" ended up giving individuals most of the protections guaranteed by the Bill of Rights, but only because the Court declared that the Due Process Clause of the Fourteenth Amendment incorporated these rights. "Liberty," as protected by the Due Process Clause of the Fourteenth Amendment, ultimately became a springboard for compelling states to conform their criminal procedures to the Fourth Amendment. The Court's landmark decisions in *Wolf v. Colorado*[20] and *Mapp v. Ohio*[21] reveal the Court's vacillating views of state practices. Initially the Court respected states' views of adequate remedies for illegal police actions, but later it mistrusted the states' remedial schemes.[22]

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[19] Barron v. Mayor & City Council of Baltimore, 32 U.S. 243, 250 (1833). *See also* Weeks v. United States, 232 U.S. 383, 393, 397 (1914) (applying Fourth Amendment and exclusionary rule to unreasonable searches and seizures by federal officials, but not to actions of municipal police officers). Because the *Weeks* Court did not view the Fourth Amendment to reach the action of state officials, it recognized different standards for federal and state courts, while at the same time emphasizing the importance of having an exclusionary rule to suppress evidence derived from illegal searches and seizures by federal officials. *Id.* at 393. The *Weeks* Court declared that, without the exclusionary rule, the Fourth Amendment "is of no value" and "might as well be stricken from the Constitution." *Id.*

[20] 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[21] 367 U.S. 643 (1961).

[22] *See generally* Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Incorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 72 (1996) ("Although rarely if ever acknowledged in Supreme Court cases, undoubtedly because of the impolitic nature of the assertion, incorporation surely rested upon a measure of disrespect for state courts.").

In *Wolf,* the Court applied the Fourth Amendment to the states, but not the federal exclusionary rule, which bars the government from using illegally seized evidence in its case in chief to prove guilt. By refusing to impose the exclusionary rule on the states, the Court relied upon the practices of a majority of states, which had rejected the exclusionary rule. By contrast, the *Mapp* Court twelve years later reversed *Wolf* in part by declaring that the exclusionary rule did apply to the states. It explained that the state practices it had relied on in *Wolf* were "not basically relevant to"[23] deciding whether the federal exclusionary rule applies to the states. An examination of these contrasting decisions and their aftermath lays the foundation for understanding the modern Court's interest in ascertaining state practices to shape the substantive contours of the Fourth Amendment.[24]

A. *Liberty as the Foundation for Incorporating the Fourth Amendment:* Wolf v. Colorado

When the Court decided *Wolf v. Colorado* in 1949, it held that the Fourth Amendment applied to the states, but that the exclusionary rule did not. Although the Court in *Mapp* reversed that part of *Wolf* refusing to impose the exclusionary rule on the states, the *Wolf* Court's discussion of both issues—incorporation of the Fourth Amendment and the lack of need for a rule of exclusion—frame the modern Court's interpretative task in defining the scope of the

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[23] *Mapp*, 367 U.S. at 651.

[24] As the Court addressed whether the Due Process Clause of the Fourteenth Amendment incorporated the provisions of other amendments, it frequently looked to state practices for guidance in determining due process. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 149, 161 (1968) (holding that Due Process Clause of Fourteenth Amendment incorporated federal jury trial guarantee of the Sixth Amendment by using the standard of whether the right was "fundamental to the American scheme of justice" and characterizing practices of "49 of 50" states as "objective criteria" to determine the seriousness of a crime requiring a jury trial); Klopfer v. North Carolina, 386 U.S. 213, 219, 220 n.5, 222-23 (1967) (holding that North Carolina's indefinite postponement of prosecution by indictment violated Sixth Amendment right to speedy trial as incorporated by Due Process Clause and noting that "every other state court" that had considered the question rejected North Carolina's practice and listing the states' *nolle prosequi* practices); Pointer v. Texas, 380 U.S. 400, 404 note, 406 (1965) (holding that Sixth Amendment's "confrontation guarantee" was safeguarded by Due Process Clause, and citing "[s]tate constitutional and statutory provisions similar to the Sixth Amendment"); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963) (deciding that Due Process Clause of Fourteenth Amendment incorporated right to counsel under the Sixth Amendment, not by considering whether the practice is "fair" in some countries, but rather whether it was "in ours"; and citing to twenty-two states that requested the Court to overrule its prior denial of this right to state criminal defendants).

Fourth Amendment. Both its view of "liberty" and its strong consideration of the states' search and seizure practices resonate with the modern Court's interpretative struggle to strike the balance of reasonableness under the Fourth Amendment.

By declaring that the Fourth Amendment applied to the states, the *Wolf* Court relied on the incorporation standard articulated in *Palko v. Connecticut*,[25] a standard also cited by the modern Court to decide whether the Due Process Clause of the Fourteenth Amendment protects a newly asserted liberty interest. Applying the *Palko* standard, the Court questioned whether the Fourth Amendment rights were "'implicit in the concept of ordered liberty,'"[26] signifying rights protected by the Due Process Clause of the Fourteenth Amendment. The Court viewed "liberty" as evolving, not "petrified as of any one time."[27] The Court noted that due process protects this fundamental liberty right and signifies a "living principle,"[28] one "not confined within a permanent catalogue of what may at a given time be deemed the limits or the essential of fundamental rights."[29] By viewing due process as an evolving source of protection, the Court explained that its judicial role did not involve drawing a clear line, but rather employing a "gradual and empiric process."[30]

The *Wolf* Court then characterized the Fourth Amendment's "core" as protecting a person's "privacy against arbitrary intrusion by police," a right "basic to a free society."[31] It unanimously held that the Due Process Clause of the Fourteenth Amendment incorporated the Fourth Amendment. By contrast, the Court recognized different remedial schemes for federal and state officials who conduct unreasonable searches and seizures. For federal officials, the exclusionary rule applied, a rule that the Court imposed in 1914 in *Weeks v. United States*.[32] For state officials, state remedial schemes satisfied the *Palko* standard.[33]

The Court justified its decision on two grounds: English practices and the practices of a majority of American states.[34] First, it

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[25] 302 U.S. 319, 325 (1937).
[26] *Wolf*, 338 U.S. at 27 (quoting *Palko*, 302 U.S. at 325).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] 232 U.S. 383 (1914).
[33] *Wolf*, 338 U.S. at 30 n.1.
[34] *Id.* at 29-31.

explained that it must "hesitate to treat this remedy as an essential ingredient of the [Fourth Amendment] right" because "most of the English-speaking world does not regard [it] as vital." It looked to ten "jurisdictions within the United Kingdom and the British Commonwealth of Nations which [had] passed on the question" of exclusion, noting that "none" had applied exclusion.[35]

Second, the Court closely scrutinized states' practices both before and after *Weeks*. It noted that before *Weeks*, twenty-seven states had considered whether to apply the exclusionary rule: twenty-six opposed using the exclusionary rule, and one state "anticipated the *Weeks* doctrine."[36] The Court explained that after *Weeks*, forty-seven states weighed in on the exclusionary rule: twenty states had considered it for the first time, with six states appling the exclusionary rule and fourteen rejecting it.[37] It also described the changes in the twenty-six states that had considered exclusion prior to *Weeks*: ten adopted the exclusionary rule either by "overruling or distinguishing their prior decisions," sixteen states still rejected the exclusionary rule, and one of these twenty-six states "repudiated its prior formulation of the *Weeks* doctrine."[38] The *Wolf* Court summarized these details: "As of today 31 States reject the *Weeks* doctrine, 16 States are in agreement with it."[39]

To remedy unreasonable searches and seizures by state officials, the Court looked to state laws to safeguard the rights protected by the Fourth Amendment. It found states' remedies adequate, "if consistently enforced."[40] These state remedies included suing police officers for trespass, suing police officers who apply for invalid warrants, suing the magistrate who acted without jurisdiction, and criminally prosecuting involved officials.[41] It also viewed community pressure against law enforcement officials as another safeguard.[42]

In the end, a majority of the *Wolf* Court deeply trusted states to protect Fourth Amendment rights. It found state practices persuasive: "We cannot brush aside the experience of States which deem the incidence of such [illegal] conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but

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[35] *Id.* at 30.
[36] *Id.* at 29.
[37] *Id.*
[38] *Id.*
[39] Wolf v. Colorado, 338 U.S. 25, 29 (1949).
[40] *Id.* at 31.
[41] *Id.* at 30 n.1.
[42] *Id.* at 32.

by overriding the relevant rules of evidence."[43] It then offered a six and one-half page appendix listing all of the state practices to which it had cited.[44]

For dissenting Justices Murphy and Rutledge, trusting state practices did not comport with the *Palko* standard.[45] They rejected counting the states to decide the due process standard: "[W]e should [not] decide due process questions by simply taking a poll of the rules of various jurisdictions."[46] They also described state "remedies"—both civil and criminal—as "illusory."[47] They viewed criminal prosecution by states as intertwining the illegal conduct of police officers with the actions of prosecutors and the judiciary.[48] First, they seriously doubted that a district attorney would "prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."[49] Second, they thought that admitting illegally seized evidence would "have [a] tragic effect upon public respect for our judiciary" by allowing "lawlessness by officers of the law."[50] In addition, the dissenting Justices highlighted the lack of case law addressing trespass suits against police officers.[51]

The *Wolf* Court thus separated the question of application of the Fourth Amendment from the question of exclusion as a required remedy. The Court created distinct practices in federal and state courts by relying on English practices, the practices of a majority of states, and their remedies for illegal conduct. Twelve years later, the Court in *Mapp v. Ohio*[52] not only rejected this reliance on state practices and remedies, but also harmonized federal and state practices, ending the "asymmetry which *Wolf* imported into the law."[53]

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[43] *Id.* at 31-32.
[44] *Id.* at 33-39.
[45] Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting).
[46] *Id.* at 46 (Murphy, J., dissenting).
[47] *Id.* at 42 (Murphy, J., dissenting).
[48] *Id.* at 42, 46 (Murphy, J., dissenting).
[49] *Id.* at 42 (Murphy, J., dissenting).
[50] *Id.* at 46 (Murphy, J., dissenting).
[51] Wolf v. Colorado, 338 U.S. 25, 44 (1949) (Murphy, J., dissenting).
[52] 367 U.S. 643 (1961).
[53] *Id.* at 670 (Douglas, J., concurring).

B. *Liberty and "Healthy" Federalism as the Foundation for Applying the Exclusionary Rule to State Search and Seizure Practices*

In 1961 the *Mapp* Court reversed *Wolf* in part by holding that the exclusionary rule applied to state criminal prosecutions.[54] To justify its reversal, the Court recast the role of state practices relied on by the *Wolf* Court. The *Mapp* Court twice characterized its prior review of state practices as "not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment"[55] as incorporated by the Due Process Clause of the Fourteenth Amendment. It also characterized state practices as "factual considerations,"[56] which had changed by 1961. In addition, it offered a different view of liberty, while still using the *Palko* Court's "implicit in the concept of ordered liberty" standard.[57]

The Court undermined the relevance of state practices in several ways. First, it described the *Wolf* Court's citing of state practice as a factual grounding, a grounding that had shifted since *Wolf*.[58] While describing how state practices had changed, the majority and dissenting opinions highlighted different aspects of state practices. The *Mapp* majority cited states' practices *since* the *Wolf* decision: "[N]ow, despite the *Wolf* case, more than one-half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule" of exclusion.[59] For its source, the *Mapp* majority cited the detailed appendix in *Elkins v. United States*, a 1960 decision which listed each state's practice before *Weeks*, before *Wolf*, and after *Wolf*.[60] While conceding that more states since *Wolf* had adopted the exclusionary rule, the dissent, by contrast, countered with a "recent survey" that "indicate[d] that at present one-half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies."[61]

Second, both the majority and the dissent declared that state practices offered little guidance in deciding the constitutional question of whether the exclusionary rule applied to the states. The

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[54] *Id.* at 657.
[55] *Id.* at 651.
[56] *Id.*
[57] *Id.* at 655.
[58] Mapp v. Ohio, 367 U.S. 643, 651 (1961).
[59] *Id.*
[60] *Id.* (citing Elkins v. United States, 364 U.S. 206, app. at 224-33 (1960)).
[61] *Id.* at 680 (Harlan, J., dissenting) (citing Julius Berman & Paul Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 NW. U. L. REV. 525, 532-33 (1960)).

Mapp Court stated that these "factual considerations . . . , while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling."[62] Similarly, the dissent declared that states' practices were "beside the point, as the majority itself indeed seems to recognize."[63] It viewed the question before the Court as a constitutional question, one in which "the disparity of views among the States on this point" reveals "that the judgment involved is a debatable one."[64]

Third, the *Mapp* Court disagreed with the *Wolf* Court's view of states having adequate remedies.[65] Instead it highlighted California's adoption of the exclusionary rule because "'other remedies [had] completely failed to secure compliance with the constitutional provisions.'"[66] In this context, the failures of other states now became relevant.[67] The *Mapp* Court cited twenty-three state statutes, noting that "[l]ess than half of the States have any criminal provisions relating directly to unreasonable searches and seizures."[68]

The *Mapp* Court thus used state practices in contrasting ways: It declared them not relevant to the constitutional question, but

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[62] *Id.* at 653.

[63] *Id.* at 680 (Harlan, J., dissenting).

[64] Mapp v. Ohio, 367 U.S. 643, 651, 680 (1961) (Harlan, J., dissenting).

[65] *Id.* at 651.

[66] *Id.* (citing People v. Cahan, 282 P.2d 905, 911 (Cal. 1955)). When selecting an important state for consideration, the Justices have highlighted those states that support their views of the exclusionary rule. For example, the dissent in *Elkins v. United States*, 364 U.S. 206 (1960), a case decided one year before *Wolf*, mentioned the same California case later cited by the majority in *Wolf,* but countered with the state practice of New York. Rios v. United States, 364 U.S. 206, 242 (1960) (Frankfurter, J., dissenting). Justice Frankfurter used the practices of New York and other states to refute the *Elkin* majority's characterization of states' adoption of the exclusionary rule as "'seemingly inexorable.'" *Id.* (citing *Wolf*, 364 U.S. at 219):

> [W]hat impresses me is the obduracy of high-minded state courts, like that of New York under the leadership of Judge Cardozo, in refusing to adopt the federal rule of exclusion. Indeed, this impressive insistence of States not to follow the *Weeks* exclusionary rule was the controlling consideration of the decision in *Wolf* not to read it into the requirement of "due process" under the Fourteenth Amendment. As the material the Court has collected shows, fully half the States have refused to adhere to our *Weeks* rule, nearly fifty years after this Court has deemed it appropriate for the federal administration of criminal justice.

Id. The Court's interest in state practices to help shape the scope of its *federal* supervisory powers reveals its underlying concern with "healthy federalism," as implicated by the "silver platter doctrine." *See infra* text accompanying notes 76-86.

[67] *Mapp*, 367 U.S. at 652 (stating that the "experience of California that . . . other remedies have been worthless and futile is buttressed by the experience of other States").

[68] *Id.* at 652 & n.7.

relevant in overruling the *Wolf* Court's rejection of the exclusionary rule. To answer the constitutional question, the Court relied on its prior *Palko* standard and its view of "'healthy federalism.'"[69] Although six Justices voted to suppress illegally seized evidence,[70] a majority of the Court did not clearly specify whether the Constitution required exclusion or whether the Court only created the remedy to effectively safeguard Fourth Amendment interests.[71]

When applying the *Palko* standard, the Court reiterated that *Wolf* had viewed the Fourth Amendment as protecting "privacy."[72] Now, however, it viewed exclusion as "an essential part of the right to privacy."[73] The Court declared that "without that rule freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of ordered liberty.'"[74] The *Mapp* Court invoked the *Wolf* Court's discussion of privacy to expand its reach to the exclusionary rule. This evolving privacy and liberty interest, "'basic to a free society,'"[75] now included the exclusionary rule as a remedy.

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[69] *Id.* at 657 (quoting *Elkins*, 364 U.S. at 221).

[70] Justice Clark wrote the opinion for the Court joined by Justices Brennan and Warren; Justices Black and Douglas wrote separate concurring opinions; and Justice Stewart concurred on suppressing the evidence, but joined the dissent in part. Thus, six voted to suppress the illegally seized evidence. *Id.* at 654-72. Justice Harlan dissented, joined in full by Justices Frankfurter and Whitaker. *Id.* at 672 (Harlan, J., dissenting).

[71] The progeny of *Weeks* and *Mapp*, however, now clearly hold that the Constitution does not compel exclusion in all circumstances when officers conduct unreasonable searches and seizures. *See, e.g.*, United States v. Leon, 468 U.S. 897, 905-06 (1984). In *Leon*, the Court described its inconsistent characterizations of foundation for the exclusionary rule:

> Language in opinions of this Court and of individual Justices has sometimes implied that the exclusionary rule is a necessary corollary of the Fourth Amendment [citing, *inter alia*, *Mapp*], or that the rule is required by the conjunction of the Fourth and Fifth Amendments [citing, *inter alia*, Justice Black's concurrence in *Mapp*]. These implications need not detain us long. The Fifth Amendment theory has not withstood critical analysis or the test of time [citing Andresen v. Maryland, 427 U.S. 463 (1976)], and the Fourth Amendment "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." [Citing Stone v. Powell, 428 U.S. 465, 486 (1976)].

Leon, 468 U.S. at 905-06.

[72] *Mapp*, 367 U.S. at 655-56.

[73] *Id.* at 656.

[74] *Id.* at 655 (quoting Palko v. Connecticut, 302 U.S. 319 (1937)).

[75] *Id.* at 656 (quoting *Wolf*, 338 U.S. at 27).

The *Wolf* Court also justified its extension of the exclusionary rule by invoking "'healthy federalism,'" as characterized in *Elkins v. United States*.[76] In *Elkins*, the Court had invoked its federal supervisory powers to bar federal officials from using evidence seized by state officials who conducted unreasonable searches and seizures. Ironically, in addressing this issue, known as the "silver platter doctrine,"[77] the *Elkins* Court split five to four, in large part because the Justices had dramatically different views of what constituted "healthy federalism."

For the *Elkins* majority "healthy federalism" meant "avoid[ing] . . . needless conflict between state and federal courts."[78] It viewed federal officials' attempt to use such state-seized evidence as "defeat[ing] the state's effort to assure obedience to the Federal Constitution."[79] While encouraging "cooperation between state and federal law enforcement officers,"[80] the *Elkins* majority viewed its rejection of the silver platter doctrine as protecting against state officials' "inducement . . . and evasion" of the Fourth Amendment standard.[81] It declared that a federal court, when considering whether state officials conducted an unreasonable search or seizure, "must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out."[82] More significantly, the *Elkins* majority stated, "[t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed."[83]

By contrast, "healthy federalism" for the *Elkins* dissent meant trusting state officials and, for reasons of comity, deferring to a state-court ruling that officials had unlawfully seized evidence.[84] The dissent highlighted the facts of the cases before the Court, in which state courts had suppressed evidence.[85] More important to modern litigation, the dissent emphasized that some states give individuals

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[76] *Id.* at 657 (quoting *Elkins*, 364 U.S. at 221).
[77] *Elkins*, 364 U.S. at 208 n.2.
[78] *Id.* at 221.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 222.
[82] *Id.* at 224.
[83] Elkins v. United States, 364 U.S. 206, 224 (1960).
[84] Rios v. United States, 364 U.S. 206, 243, 245-47 (1960) (Frankfurter, J., dissenting).
[85] *Id.* at 247 (Frankfurter, J., dissenting).

greater protection than that provided by the Fourth Amendment.[86] From its perspective, the majority's rule would "encourage state illegalities" because a federal court could admit evidence "directly contrary to state law."[87] For the dissent, the Court's decision applying the exclusionary rule to the states was "pregnant with new disharmonies between federal and state authorities and between federal and state courts."[88]

Yet, for the *Mapp* Court, "healthy federalism" arose from having both state and federal officials' evidence suppressed if their actions violated the Fourth Amendment. It politely excused federal officials as "being human" when they had previously complied with requests from state officials in non-exclusionary states to give them evidence that federal officials could not use in federal court.[89] By harmonizing the exclusionary rule to apply to the actions of both federal and state officials, the *Mapp* Court viewed its ruling as promoting "[f]ederal–state cooperation in the solution of crime."[90] To allow for different standards, the Court stated, would be "to breed legitimate suspicion of 'working arrangements' whose results are equally tainted."[91]

The *Mapp* Court, however, never hinted how to address the *Elkins* dissent's concern about states that grant greater protection than that provided by the Fourth Amendment. For now, it took healthy federalism to signify equal application of the exclusionary rule to federal and state officials for violations of the Fourth Amendment. Modern federal courts, however, have seen this harmony disappear as states grant greater protection under their constitutions and statutes than that provided by the Fourth Amendment.[92]

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[86] *Id.* at 245 (Frankfurter, J., dissenting) ("So comity plays no part at all, and the fruits of illegal law enforcement may well be admitted in federal courts directly contrary to state law.").

[87] *Id.* (Frankfurter, J., dissenting). Justice Frankfurter viewed the Court's ruling as allowing state officials to give federal officials evidence seized in violation of state law that was more protective than the Fourth Amendment. He argued that under the majority's rule, a "state officer who disobeys [a state regulation] needs only to turn his evidence over to the federal prosecutor, who may freely utilize it under today's innovation in disregard of the disciplinary policy of the State's exclusionary rule." *Id.* at 245-46 (Frankfurter, J., dissenting).

[88] *Id.* at 243 (Frankfurter, J., dissenting).

[89] *Mapp*, 367 U.S. at 658.

[90] *Id.*

[91] *Id.*

[92] *See, e.g.*, James W. Diehm, *New Federalism and Constitutional Criminal Procedure: Are We Repeating the Mistakes of the Past?*, 55 MD. L. REV. 223, 250 (1996). Professor Diehm has described how the harmony that *Mapp* created disappeared when state courts began to interpret their state constitutions and statutes to provide greater

By applying the Fourth Amendment and its exclusionary rule to the states, the Court thus read the Due Process Clause of the Fourteenth Amendment to protect privacy as "implicit in the concept of ordered liberty." The Court initially gave the states time to decide whether the exclusionary rule applied in their proceedings, but after time, it characterized the states' trend as one towards inclusion, despite a vociferous dissent rejecting this characterization and offering a different view of healthy federalism. It deemed the exclusionary rule to be a needed and effective remedy.

With the *Mapp* decision harmonizing exclusionary practices in 1961, the Burger and Rehnquist Courts began narrowing both the scope of the Fourth Amendment and the exclusionary rule.[93]

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rights than the Fourth Amendment. *Id.* at 252-53. He noted three types of conflicts: federal criminal prosecutions using evidence derived from state officials, state prosecutions using evidence derived from federal officials, and state prosecutions using evidence derived from states with different standards than the prosecuting state. *Id.* With these conflicts, "criminal procedure has come full circle." *Id.* at 253.

> Compelling reasons may exist not to apply the law of the forum, but the failure to do so can also lead to problems. If a state court does not apply its more stringent state standards to federal officers, similarly situated state defendants will be treated differently, the admissibility of evidence will be determined by the badge of the officer rather than the legality of the act, and silver platter abuses will be encouraged. Similar problems develop in interstate situations where the court may choose to apply the law of another state. These were exactly the injustices noted by pre-*Mapp* authors that led to the Court's decision in *Mapp*.

Id. at 252-53. As of 1996, Professor Diehm had discerned that "most federal courts" and "many scholars" support applying federal standards in federal courts. *Id.* at 251. For state prosecutions, Diehm observed that "many state courts" seemed compelled to apply federal standards to federal officials' testifying in state court. *Id.* at 252.

[93] For example, the modern Court significantly limited the exclusionary rule by creating a good faith exception in *United States v. Leon*, 468 U.S. 897, 913 (1984). Under this exception, prosecutors could use in their case in chief evidence from an unreasonable search and seizure if police officers had acted in "objective good faith" in obtaining the evidence. *Id.* at 919 n.20. To create this exception, the Court explicitly invoked a "costs and benefits" standard, which was implicit in the its general reasonableness balancing test under the Fourth Amendment. *Id.* at 913. In this context, however, the Court did not cite state practices to support its new limitation. Instead, it cited prior concurring and dissenting opinions and *one* opinion from the Fifth Circuit en banc, which had explicitly created a good faith exception. *Id.* at 913 n.11. The *Leon* Court's extension grew to apply to other objectively unreasonable violations of the Fourth Amendment; these exceptions extended prosecutors' ability to use illegally seized evidence to prove guilt. *See, e.g.*, Arizona v. Evans, 514 U.S. 1, 15-16 (1995) (holding that if a court clerk caused a computer error that led a police officer to mistakenly believe that an arrest warrant for a stopped driver existed, the exclusionary rule would not apply to the evidence the officer seized in reliance on this judicial officer); Illinois v Krull, 480 U.S. 340, 356-57, 360 n.17 (1987) (holding that if a police officer acted within the scope of a state statute, which might be unconstitutional, his actions were objectively reasonable and the prosecution could use seized evidence to prove guilt); Massachusetts v.

Encouraged by Justice Brennan[94] and other state and federal supreme court justices,[95] state courts eventually interpreted their state constitutions and statutes to provide greater protection than that provided by the Fourth Amendment. State courts thus wrote opinions referring to state provisions as well as the Fourth Amendment. When these cases came to the United States Supreme Court, the Court addressed its jurisdiction to review decisions that not only discussed the Fourth Amendment, but also relied on state law. In 1983, in *Michigan v. Long*,[96] the Court opted for a rule that diminished the influence of state-court opinions and strongly safeguarded federal interpretative turf.[97]

II. PROTECTING FEDERAL INTERPRETATIVE TURF: THE "PLAIN STATEMENT" REQUIREMENT AND ITS AFTERMATH

In *Michigan v. Long*, the Court admitted that the selective incorporation doctrine had created a strong federal presence in state criminal proceedings by requiring states to comply with most of the provisions in the Bill of Rights.[98] As a result, the *Long* Court declared a special need to clarify when it has jurisdiction from a state-court judgment that referred both to the Fourth Amendment and state law. It also characterized its prior jurisdictional case law as inconsistent

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Sheppard, 468 U.S. 981, 984 (1984) (applying *Leon*'s newly created good faith exception to the exclusionary rule to a magistrate's "technical error" in issuing a search warrant). In *Leon*, *Evans*, and *Krull*, the Court stated that the purpose of the exclusionary rule was to deter unreasonable conduct by police officers, not errors made by judges, clerks, or state legislative bodies. *Leon*, 468 U.S. at 916-17; *Evans*, 514 U.S. at 14; *Krull*, 480 U.S. at 350. As a result, locating the source of unreasonable or erroneous conduct significantly affected the Court's decision to apply or not to apply the exclusionary rule.

[94] *See, e.g.*, Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

[95] *See, e.g.*, Hans Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379 (1980). For a detailed summary of the numerous justices encouraging the state courts to interpret their constitutions and statutes, see WAYNE R. LAFAVE, 1 CRIMINAL PROCEDURE § 2.11(a) (2003).

[96] 463 U.S. 1032 (1983).

[97] *See, e.g.*, Michael Esler, Michigan v. Long: *A Twenty Year Retrospective*, 66 ALB. L. REV. 835, 855 (2003) (stating that *Long* "has been most successful in expanding the meaning of what constitutes federal legal grounds"). For a discussion of *Long*, see *infra* Part II.

[98] *Long*, 463 U.S. at 1042 n.8 ("It is not surprising that this Court has become more interested in the application and development of federal law by state courts in the light of the recent significant expansion of federally created standards that we have imposed on the States.").

and the issue as "vexing."[99] It created a new presumption favoring review by the United States Supreme Court:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.[100]

Under the Court's rule, a state court may block review by the Court if it writes a "plain statement in its judgment or opinion that the federal cases . . . do not themselves compel the result that the court has reached."[101] By creating this rule, the Court protected its federal interpretative turf.

The Court attempted to draw a sharp line between its own interpretation of the Fourth Amendment and those of state courts. The Court viewed its three prior approaches as undermining "federal–state relations."[102] Under those approaches, the Court previously had dismissed the case for lack of clarity, retained jurisdiction and sought clarification from the state court, or determined on its own when the state court's decision rested on an independent and adequate state ground.[103] It viewed its rule of presumptive jurisdiction as providing "state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference."[104]

Although the Court underscored that the new jurisdictional rule would fulfill an "important need for uniformity in federal law,"[105] it nevertheless allowed for an exception. Under the exception, the

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[99] *Id.* at 1038.

[100] *Id.* at 1040-41. One year after *Long*, the Court replaced the "and" with an "or" in the phrase "and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Ohio v. Johnson, 467 U.S. 493, 497 n.7 (1984) ("Ordinarily, we have jurisdiction to review a state-court judgment, if the decision "appears to rest primarily on federal law, or to be interwoven with the federal law," *or* if the "adequacy and independence of any possible state law ground is not clear from the face of the opinion." (quoting *Long*, 463 U.S. at 1040-41) (emphasis added)).

[101] *Long*, 463 U.S. at 1041.

[102] *Id.* at 1039.

[103] *Id.* at 1038-39.

[104] *Id.* at 1041.

[105] *Id.* at 1040.

Court could take a different action in "certain circumstances" when "necessary or desirable."[106]

When deciding that it would presume jurisdiction from state-court judgments regardless of whether the state court had accepted or rejected the federal claim, the *Long* Court explicitly rejected dissenting Justice Stevens' view that the Court should not review cases when a state court has protected a criminal defendant's asserted federal right.[107] For Justice Stevens, the Court's "primary role . . . is to make sure that persons who seek to *vindicate* federal rights have been fairly heard."[108] The Court, however, rejected this type of limited jurisdiction because it had a different perspective on federalism. For the majority, federalism signified a strong need for a uniform view of federal law;[109] for the dissent, federalism signified that states constituted a separate sovereign, one free from the actions of another as long as it protected the rights safeguarded by the other sovereign.[110] The dissent dramatically distinguished between sovereigns by characterizing the Supreme Court's presumptive review as similar to the United States Supreme Court reviewing a judgment from the Republic of Finland's court that had acquitted a criminal defendant by interpretating the United States Constitution.[111] For the dissent, a state court protecting a criminal defendant's asserted constitutional rights resembled a judgment similar to the hypothetical ruling from the Republic of Finland.[112] By contrast, the *Long* majority viewed federalism as affording the Court a necessary role in defining the boundaries of constitutional protections.[113]

The *Long* Court also protected its interpretative turf by rejecting the dissent's argument that review would squander "scarce federal judicial resources."[114] The majority viewed the presumptive jurisdiction rule as improving "both justice and judicial administration."[115] By requiring a "plain statement" from the state

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[106] *Id.* at 1041 n.6. After *Long*, the Court in a per curiam decision nevertheless remanded for clarification, without explicitly invoking this exception. Capital Cities Media, Inc. v. Toole, 466 U.S. 378, 379 (1984) (per curiam). Justice Ginsburg has indicated that she supports this exception. Arizona v. Evans, 514 U.S. 1, 26 (1995) (Ginsburg, J., dissenting).

[107] *Long*, 463 U.S. at 1042 n.8.

[108] *Id.* at 1068 (Stevens, J., dissenting).

[109] *Id.* at 1040, 1042 n.8.

[110] *See id.* at 1068 (Stevens, J., dissenting).

[111] *Id.*

[112] *Id.* at 1072 (Stevens, J., dissenting).

[113] *See id.* at 1041.

[114] *Id.* at 1067 (Stevens, J., dissenting).

[115] *Id.* at 1041.

court, the majority explained that it would "avoid the danger of . . . rendering advisory opinions."[116]

Despite the Court's concerns about advisory opinions, its decisions since *Long* have frequently had no effect on the particular case for which it granted review. State courts, as recognized by the *Long* Court,[117] have, on remand, nevertheless decided in favor of criminal defendants by applying more protective state constitutions or statutes.[118]

Since the *Long* Court created this presumptive jurisdictional rule, state courts have more frequently interpreted their state search and seizure provisions to provide greater protection than that provided by the Fourth Amendment.[119] The meaning of the *Long* rule depends upon one's view of federalism. Some scholars have declared that the Court "has applied the 'plain statement' rule without difficulty,"[120] while nonetheless stating that state courts have "no need . . . to draw a sharp distinction between" federal and state questions.[121] Some scholars have seen the *Long* rule as one forcing state-court justices to be accountable for their decisions,[122] with fearful state-elected judges interpreting their state laws to be in "lockstep" with federal law.[123] Others have viewed the Court's rule as allowing

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[116] *See id.*

[117] *Id.*

[118] *See, e.g.*, Pennsylvania v. Labron, 518 U.S. 938, 951 n. 8 (1996) (Stevens, J., dissenting) (noting that state courts "on many occasions" have affirmed "the original holding on state-law grounds" after reversal and remand by the United States Supreme Court); Arizona v. Evans, 514 U.S. 1, 32 (1995) (Ginsburg, J., dissenting) (noting that after the *Long* decision, state courts reinstated their prior judgments in "26.7%" of cases reversed and remanded by the Supreme Court); *see also* Robert F. Williams, *The Third Stage of the New Judicial Federalism*, 59 N.Y.U. ANN. SURV. AM. L. 211, 221 (2003). *But see id.* at 219-20 (listing state courts that upon reversal and remand changed their interpretation of state law to mirror the federal standard).

[119] *See infra* note 353.

[120] CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE: FEDERAL PRACTICE DESKBOOK §114, at 1076 n.107 (2002); *see also* Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 341 (2002) ("Difficulty in compliance with the plain statement rule likewise cannot be seriously contended.").

[121] WRIGHT & KANE, *supra* note 120, §114, at 1074 n.100.

[122] *See, e.g.*, Stewart G. Pollock, *The Court and State Constitutional Law*, *in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION? 244, 245 (Bernard Schwartz ed., 1998) (citing Michael Esler, *State Supreme Court Commitment to State Law*, 78 JUDICATURE 25, 30 (1994)); Solimine, *supra* note 120, at 342 (citing Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979, 989 (1993).

[123] Solimine, *supra* note 120, at 342 (citing Edward Hartnett, *Why Is the United States Supreme Court Protecting State Judges from Popular Democracy?*, 75 TEX. L. REV. 907, 981-82 (1997)).

state courts to enter a territory with "hidden dangers."[124] Still, others have surmised that the Court hoped that states would not expand their laws, but would rather interpret their laws to mirror the Court's interpretations.[125]

Even though the *Long* rule protected federal interpretative turf, the Court has ironically at times looked to modern *state* laws to shape the contours of the Fourth Amendment. Because the Court has selectively invoked modern state practices to ascertain the Fourth Amendment's scope, such a practice does not intrude on the turf guarded by the *Long* rule. Rather, this practice highlights the principle that the Fourth Amendment has an evolving standard of reasonableness.

III. SELECTIVELY TRUSTING STATES TO ENACT CONSTITUTIONALLY REASONABLE POLICE PRACTICES

In several important decisions assessing the reasonableness of officers' seizing and arresting suspects, the Court has attempted to justify its determination in part by citing modern state practices. In these decisions, the Court has extensively analyzed state practices as a factor in determining reasonableness. The Court has viewed state practices as relevant to its task of defining Fourth Amendment reasonableness. The Court has used state practices in different ways: Sometimes it has used the practice of the majority of states to support its reasonableness determination, and sometimes it has ascertained the states' "trend" away from a majority of practices. The Court has also explicitly trusted state legislatures when interpreting the scope of the exclusionary rule. In addition, the Court has also refused to closely scrutinize state officials' allocation of policing resources when considering the means they selected to further a law enforcement goal. The Court's interest in current state police standards suggests a unique type of "Fourth Amendment federalism," one in which the Court's rhetorical deference suggests a trust in the states. The Court's decisions, however, do not uniformly reflect a deep trust of

[124] Pollock, *supra* note 122, at 246.

[125] Solimine, *supra* note 120, at 340. In an opinion decided shortly before the *Long* decision, Chief Justice Burger blamed Florida law for the "untoward result" that a Florida statute had created by requiring suppression of more than "100 pounds of marihuana discovered aboard a fishing vessel." Florida v. Cassal, 462 U.S. 637, 637 (1983) (Burger, C.J., concurring). Although Chief Justice Burger concurred because he viewed state law as constituting an independent and adequate ground barring review, he urged voters to change the law in order to have a "rational law enforcement" system. *Id.* at 639.

states. The Court has limited its trust by using state practices as a factor and, more importantly, it has *selectively* deferred to state laws.

Yet, in other Fourth Amendment decisions, the Court has not mentioned state practices in deciding Fourth Amendment reasonableness.[126] The Court's selective use of state practices resembles its earlier interpretive struggles when deciding whether the Fourth Amendment and the exclusionary rule applied to the states through the Due Process Clause of the Fourteenth Amendment. In the end, the Court's selective use of state practices underscores the evolving protections provided by the Fourth Amendment.

A. *Citing State Laws and Constitutions to Justify Important Arrest Rules*

The Court has looked to state practices in constructing important arrest rules. Although the Court has not characterized these practices as dispositive in deciding the reasonableness of an arrest, it has used them to support its ultimate determination. In three significant decisions between 1976 to 2001, the Court examined state practices and pronounced broad, foundational principles for seizing and arresting suspects. In 1976, the Court held in *United States v. Watson*[127] that officers did not need a warrant or exigent circumstances to arrest a suspect in public when the officers had

[126] During the 2003–2004 term, the Court generally interpreted precedent to justify its Fourth Amendment interpretations. *See* Thorton v. United States, 541 U.S. 615, 623-24 (2004) (distinguishing and extending precedent to uphold search of a vehicle incident to the arrest of a "recent occupant"); United States v. Flores-Montano, 541 U.S. 149, 152-56 (2004) (citing old and modern federal statutes and extending precedent to uphold government's authority to disassemble and search gas tank at border, even absent reasonable suspicion; arguing that states' practices would not be logically relevant to government's interest in safeguarding borders); Groh v. Ramirez, 540 U.S. 551, 562-64 (2004) (justifying decision by citing Fourth Amendment particularity requirement and precedent, and holding search warrant facially invalid and denying qualified immunity to police officer who sought and executed the warrant); Illinois v. Lidster, 540 U.S. 419, 425-28 (2003) (distinguishing precedent and looking to "community hostility" to limit official's use of roadblocks in which officers stop and question drivers about past crimes); Maryland v. Pringle, 540 U.S. 366, 372-74 (2003) (extending precedent to uphold officer's probable cause determination that car occupant had possessed an illegal drug, despite presence of other individuals in the car stopped for speeding); United States v. Banks, 540 U.S. 31, 36 n.2, 38 (2003) (citing in a footnote state practices about "no-knock warrants," which were irrelevant to the Court's holding, based on precedent, that officers acted reasonably by waiting fifteen to twenty seconds after knocking and announcing their search warrant authority to look for drugs in a residence). *But see* Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2459-61 (2004) (citing current state statutes as well as precedent).

[127] 423 U.S. 411 (1976).

probable cause to believe that he had committed a felony.[128] Four years later, in *Payton v. New York*,[129] the Court held that officers did need an arrest warrant to enter a suspect's home, even when they had probable cause to believe that the suspect had committed a felony.[130] Recently, in *Atwater v. Lago Vista*,[131] the Court expressed deep trust in state laws and held that an officer acted reasonably when he arrested a driver for violating traffic laws, even when state law provided only a fine as a penalty for the offenses.[132] By citing the practices of a majority of states, the Court underscored the need for a workable rule for police officers, but also one with extensive support among the states.

1. A Majority of States Supporting Court's Warrantless Arrest Rule: *United States v. Watson*

In *United States v. Watson*, the Court upheld a federal statute[133] that had authorized postal officials, who have probable cause to believe that a suspect "has committed or is committing such a felony," to make a warrantless arrest.[134] To uphold this statute, the Court used numerous sources to arrive at its reasonableness determination. It looked to old and current federal statutes, the "ancient common-law rule"[135] as reflected in its precedents, old and current state practices, and a model code proposed by the American Law Institute.[136] It used state practices to support its viewing the common-law rule as a foundational Fourth Amendment rule.[137] For the Court, the common law allowed an officer "to arrest without a warrant for a misdemeanor or felony committed in his presence . . . if there was reasonable ground for making the arrest."[138] The Court used state-court decisions from 1814 to 1866 to show that "the common-law rule . . . generally prevailed in the States."[139] It also characterized modern state practices as continuing to adhere to the common-law rule, stating that the rule had "survived substantially intact . . . in almost all

[128] *Id.* at 423-24.
[129] 445 U.S. 573 (1980).
[130] *Id.* at 600-01.
[131] 532 U.S. 318 (2001).
[132] *Id.* at 354.
[133] 18 U.S.C. § 3061(a)(3) (1970) (amended 1988).
[134] *Watson*, 423 U.S. at 414-15, 424.
[135] *Id.* at 418.
[136] *Id.* at 415-22.
[137] *Id.* at 422-23.
[138] *Id.* at 418.
[139] *Id.* at 419-20 (internal citations omitted).

of the States in form of express statutory authorization."[140] With the *Watson* Court citing not only state practices and the common law, but also federal statutes and a proposed model statute, state practices emerged as only a factor in deciding the important Fourth Amendment arrest rule.

By relying on these sources, the Court had to diminish the force of its own precedent, which had at times expressed a strong preference for warrants.[141] The Court's handling of its precedents highlights its deference to the judgments of the states, Congress, and the American Law Institute:

> [W]e decline to transform this judicial preference [for a warrant] into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like.[142]

Ironically, as the Court invoked the practices of the states to justify its reasonableness determination, it nonetheless mentioned a federal statute specifically enacted to create "a federal standard independent of the vagaries of state laws."[143] Thus, in one section, reliance on state practices furthered its determinations, yet in another, reliance on state practices undermined federal need for uniformity.

A concurring opinion by Justice Powell similarly invoked the common law and state practices, but admitted what the majority did not: its opinion created an "anomaly" by allowing officers to arrest without warrants but requiring warrants for many searches.[144] Justice Powell candidly stated, "[b]ut logic sometimes must defer to history and experience."[145] Justice Powell cited the wisdom of state courts, legislatures, and "law enforcement agencies" as expressing a need for warrantless arrests under these circumstances.[146]

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[140] United States v. Watson, 423 U.S. 411, 421-22 (1976).

[141] *Id.* at 423.

[142] *Id.* at 423-24.

[143] *Id.* at 421 (citing 18 U.S.C. § 3053 (1948), which allowed marshals to make warrantless arrests).

[144] *Id.* at 427-28 (Powell, J., concurring).

[145] *Id.* at 429 (Powell, J., concurring).

[146] United States v. Watson, 423 U.S. 411, 430 (1976) (Powell, J., concurring) ("Both the judiciary and the legislative bodies of this Nation repeatedly have placed their imprimaturs upon the practice and, as the Government emphasizes, law enforcement agencies have developed their investigative and arrest procedures upon an assumption that warrantless arrests were valid so long as based on probable cause.").

Reliance on these sources for assessing reasonableness engendered a strong dissent, one that criticized the Court for not using its own "reasoned analysis"[147] to decide the constitutionality of a police practice.[148] It criticized the Court's use of the common law because the common law and current law categorized felonies and misdemeanors differently.[149] More importantly, the dissent invoked *Marbury v. Madison*.[150] It stated, "[t]he Court's error on this score is far more dangerous than its misreading of history, for it is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice."[151]

2. States' Movement Towards an Arrest Warrant Requirement to Enter a Home: *Payton v. New York*

Despite the dissent's strong criticism of *Watson*'s sources for deciding reasonableness, the Court in *Payton v. New York*[152] similarly grounded its Fourth Amendment arrest rule, but this time it characterized the sources as less clear in deciding reasonableness. In *Payton*, the Court interpreted the Fourth Amendment to strike down two New York statutes that allowed police officers to arrest felons in their homes without using an arrest warrant.[153] In deciding that the officers needed an arrest warrant,[154] the Court considered the same sources as it had in *Watson* for constructing this arrest rule, yet characterized those sources as providing less clarity than they did in *Watson*. It viewed *Watson* as considering three sources—the common law, state practices, and federal statutes.[155]

In examining the common law to characterize what the Framers might have intended, the Court stated that the "relevant common law

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[147] *Id.* at 433-34, 442-43 (Marshall, J., dissenting).

[148] *Id.* at 438 (Marshall, J., dissenting).

[149] *Id.* at 439-42 (Marshall, J., dissenting). The dissent also declared that even if the categorizations of felonies and misdemeanors were the same at common law and today, the Court would still have an independent duty to balance interests. *Id.* at 442 (Marshall, J., dissenting) (stating that "the Court's unblinking literalism cannot replace analysis of the constitutional interests involved").

[150] *Id.* at 443 (Marshall, J., dissenting) (citing Marbury v. Madison, 5 U.S. (I Cranch) 137 (1803)).

[151] *Id.* (Marshall, J., dissenting).

[152] 445 U.S. 573 (1980).

[153] *Id.* at 603.

[154] The *Payton* Court specifically left open whether the Fourth Amendment allows warrantless entries of suspects' residences when they have both probable cause and exigent circumstances. *Id.* at 583. It noted that the lower courts had not addressed the issue of exigent circumstances. *Id.*

[155] *Id.* at 590.

[did] not provide the same guidance that was present in *Watson*."[156] It then diminished the common law's significance by characterizing it as not "definitively settl[ing]" the Fourth Amendment arrest issue.[157] It also undermined the common law's importance by inconsistently characterizing its role in assessing Fourth Amendment reasonableness. For the *Payton* Court, the common law was not only "obviously relevant," but could also be "entirely dispositive . . . of what the Framers of the Amendment might have thought to be reasonable."[158] By contrast, it also characterized the Fourth Amendment as reflecting "contemporary norms and conditions."[159] It undercut the force of the common law as a source by stating that it had "not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage."[160]

With the common law providing little guidance, the *Payton* Court considered *Watson*'s use of state practices in deciding reasonableness.[161] In *Payton*, the Court deftly undercut its prior consideration of how a majority of states viewed the issue. The Court candidly admitted the majority rule did not harmonize with its warrant requirement. It stated, "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances."[162] It initially summarized state statutes in this manner: twenty-four permitted warrantless entries, fifteen did not, and eleven had not decided.[163] Despite this majority rule, the Court nonetheless used state-court decisions that struck down these state statutes to support a different characterization: a current "significant decline during the last decade in the number of States permitting warrantless entries for arrest."[164] It also recast the majority rule as a minority rule by including those states that had not considered the issue.[165] It stated, "Only 24 of the 50 States currently sanction warrantless entries into the home to arrest, . . . and there is an obvious declining trend."[166]

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[156] *Id.* at 597.
[157] *Id.* at 598.
[158] Payton v. New York, 445 U.S. 573, 591 (1980).
[159] *Id.* at 591 n.33.
[160] *Id.*
[161] *Id.* at 598-600.
[162] *Id.* at 598.
[163] *Id.* at 598-99.
[164] Payton v. New York, 445 U.S. 573, 599 (1980).
[165] *See id.* at 600.
[166] *Id.*

The Court also considered state constitutions to support its warrant requirement under the Fourth Amendment. It noted that seven states had interpreted their state constitutions to require warrants, and it characterized these interpretations as revealing the "depth of the principle."[167] The Court stated, "[t]hat is significant because by invoking a state constitutional provision, a state court immunizes its decision from review by this Court."[168] The Court used these interpretations to emphasize the importance of requiring a warrant under the Fourth Amendment.[169]

In addition, the *Payton* Court selectively used state practices to construct an evolving Fourth Amendment.[170] It viewed the word "reasonable" as "amorphous" and stated that "custom and contemporary norms necessarily play . . . a large role in the constitutional analysis."[171]

In considering the third *Watson* factor—congressional acts—it noted that none had specifically authorized warrantless entries into a home.[172] And it briefly mentioned a model code provision by the American Law Institute that barred such entries only at night.[173] The majority in *Payton* neither distinguished nor embraced this model code provision.

The Court's characterization of each of the *Watson* factors, however, did not match the dissent's.[174] For the dissent, the common law clearly did not require an arrest warrant to enter a residence,[175] the states' "consensus" did not support the Court's warrant requirement,[176] and the lack of express federal statutory authorization for homes did not negate authorization to arrest without a warrant.[177] With the common law clear from the dissent's perspective, Congress had "intended" that the common-law rule apply.[178]

Although the Justices in *Payton* interpreted differently the common law, state practices, and federal practices, they nonetheless

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[167] *Id.*
[168] *Id.*
[169] *Id.* at 598-600
[170] Payton v. New York, 445 U.S. 573, 600 (1980).
[171] *Id.*
[172] *Id.* at 601.
[173] *Id.* at 581 n.14.
[174] *Id.* at 603-16 (White, J., dissenting).
[175] *Id.* at 611, 616 (White, J., dissenting) (stating that "warrantless arrest entries were . . . firmly rooted at common law," and criticizing majority for "ignor[ing] the carefully crafted restrictions on the common-law power of arrest entry").
[176] Payton v. New York, 445 U.S. 573, 614 (1980) (White, J., dissenting).
[177] *Id.* (White, J., dissenting).
[178] *Id.* at 615 (White, J., dissenting).

considered them as grounding their Fourth Amendment determination. In crafting these arrest rules, the Court in both *Payton* and *Watson* cited current state practices as support. The Court's recent decision in *Atwater v. City of Lago Vista*[179] reflects a similar grounding, one that created a broad arrest rule while noting that statutes, not the Fourth Amendment, can better specify limits on arrest powers.[180]

3. A Majority of States Allowing Arrests for Minor Offenses: *Atwater v. City of Lago Vista*

In *Atwater v. City of Lago Vista*, the Court created an expansive Fourth Amendment arrest rule.[181] It held that an officer acted reasonably within the meaning of the Fourth Amendment when arresting a driver without a warrant for committing offenses that provide only for fines, not for incarceration.[182] Even though the Court declared that the officer had "(at best) exercis[ed] extremely poor judgment,"[183] it nonetheless viewed its judicial role as providing a broad Fourth Amendment principle. To justify its reasonableness determination, the Court cited the same sources it had used in *Watson* and *Payton* as well as others: pre-founding practices in English common law and statutes and modern state and federal arrest statutes.[184] In the end, the Court's decision expressed deep trust in state legislatures to craft sound limits on arrest powers.

By embracing a broad Fourth Amendment arrest power, the Court rejected two limiting rules proposed by the arrested driver: first, that officers may make warrantless arrests for misdemeanors only if they involve a "breach of the peace";[185] and second, that officers may not arrest without a warrant "when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."[186]

With respect to the first rule, the driver had urged the Court to embrace her construction of the common law. The Court, however,

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[179] 532 U.S. 318 (2001).

[180] *Id.* at 352 ("It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle.").

[181] *Id.* at 354-55.

[182] *Id.*

[183] *Id.* at 346-47.

[184] *Id.* at 331-35.

[185] Atwater v. City of Lago Vista, 532 U.S. 318, 327 (2001).

[186] *Id.* at 346.

disagreed with the suggestion that the common law had a "breach of peace" requirement.[187] The Court cited pre-founding and founding era sources describing the common law,[188] declaring that "early English statutes" had "riddle[d] . . . [her] supposed common-law rule with enough exceptions" to undermine her construction of what the Fourth Amendment Framers might have intended.[189] In addition, the Court characterized early state practices as consistent with its view of the common law, noting they too permitted warrantless arrests for "nonviolent misdemeanors."[190] The Court stated that even though "the Fourth Amendment did not originally apply to the States,"[191] early state practices are not "irrelevant in unearthing the Amendment's original meaning."[192]

The Court also cited the *Watson* Court's discussion of federal statutes to undercut the first proposed rule. It noted that early Congressional statutes allowed for broad, warrantless arrest powers.[193] It reiterated that the Second Congress had given "'United States marshals the same power as local peace officers' to make warrantless arrests."[194] By viewing early practices as inconsistent with the proposed rule, the *Atwater* Court then looked to modern law. It discerned "two centuries of uninterrupted (and largely unchallenged) state and federal practice permitting warrantless arrests for misdemeanors not amounting to or involving breach of the peace."[195]

In a lengthy appendix, the Court cited arrest statutes from fifty states harmonious with its broad arrest principle.[196] For the Court, the presence of these modern statutes provoked an unusually condescending tone: "Small wonder, then, that today statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace . . . ."[197] For the Court, modern statutes supported its construction of English and American common law

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[187] *Id.* at 327.
[188] *Id.* at 327-40.
[189] *Id.* at 335.
[190] *Id.* at 338.
[191] Atwater v. City of Lago Vista, 532 U.S. 318, 338-39 (2001).
[192] *Id.* at 339.
[193] *Id.*
[194] *Id.* (citing United States v. Watson, 423 U.S. 411, 420 (1976)).
[195] *Id.* at 340.
[196] *Id.* at 355-60.
[197] Atwater v. City of Lago Vista, 532 U.S. 318, 344 (2001).

that officers may arrest for a misdemeanor committed in their presence.

The Court also considered the driver's second proposed rule, which would have barred arrests for offenses involving only a fine and that did not present a "compelling need for immediate detention."[198] The Court, characterizing the rule as an invitation to create a "modern arrest rule"[199] limited to the facts of the case, candidly admitted that if it were to do so, the arrestee "might well prevail."[200] The Court instead declared that it would not "mint a new rule of constitutional law"[201] by balancing interests to determine the reasonableness of this particular arrest. Instead the Court wrote expansively about the need to trust states and protect police officers from lawsuits.[202]

The Court viewed states as acting reasonably in drawing lines for authorized arrests. It cited eight state statutes that had restricted "warrantless arrests for minor offenses."[203] The Court broadly defined arrest powers permissible under the Fourth Amendment in part because it viewed state legislatures as better suited to drafting limitations: "It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle."[204]

It further trusted the states and police officers to arrest only when needed because of the financial burdens on limited state resources.[205] Such self-policing, the Court implied, had already occurred because it discerned a "dearth of horribles demanding address."[206] It also trusted officers not to conduct arbitrary arrests.[207]

The Court also rejected balancing interests because that approach would not provide officers with a bright-line rule to

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[198] *Id.* at 346.
[199] *Id.*
[200] *Id.*
[201] *Id.* at 345-46.
[202] *Id.* at 351.
[203] Atwater v. City of Lago Vista, 532 U.S. 318, 352 (2001).
[204] *Id.*
[205] *Id.* ("It is, in fact, only natural that States should resort to this sort of legislative regulation . . . [because] it is in the interest of the police to limit petty-offense arrests, which carry costs that are simply too great to incur without good reason.").
[206] *Id.* at 353.
[207] *Id.* at 353 n.25.

administer.[208] The Court explained that a bright-line, broad-categorical rule would safeguard officers' decisions to arrest when they believed that circumstances indicated a need for an arrest.[209] A more narrow arrest power, the Court contended, would end up subjecting officers to too many lawsuits, which would undermine their ability to decide whether to arrest an offender.[210] The Court boldly declared as inadequate the potent affirmative defense of qualified immunity,[211] which gives officers immunity from suit as well as a defense to liability as long as they did not violate "clearly established" law.[212] The Court did not, however, explain its conflicting characterizations of the driver's proposed balancing standard for arrests: on the one hand, a balancing standard would not have given officers enough clarity, but on the other hand, it would have created clearly established law, forcing them to lose their qualified immunity defense.[213]

The Court added that the only times officers could face liability would be when they conducted arrests in "'an extraordinary manner, unusually harmful to [a person's] privacy or . . . physical interests.'"[214] While noting that arrests may be "humiliating" as well as "inconvenient," the Court described the driver's particular arrest as not "so extraordinary as to violate the Fourth Amendment."[215]

The *Atwater* Court thus trusted the states and police officers to authorize and conduct reasonable arrests for minor offenses. The Court viewed state legislatures as a better institution for crafting limiting rules. It also viewed states' limited policing and financial resources as a check on this broad arrest discretion. By refusing to balance the privacy and physical interests of particular individuals who commit minor offenses against the government's need to arrest, the Court ultimately limited rights under the Fourth Amendment.

Thus, in assessing whether state arrest rules complied with the Fourth Amendment, the Court in *Watson*, *Payton*, and *Atwater* in part looked to state practices, sometimes invoking the practices of a majority of states and sometimes characterizing the state practices as reflecting a particular "trend." The Court's invocation of state

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[208] *Id.* at 354 (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)).
[209] Atwater v. City of Lago Vista, 532 U.S. 318, 350-51 (2001).
[210] *Id.* at 350.
[211] *Id.* at 351 n.22.
[212] *Id.* at 367.
[213] *See id.* at 350-51.
[214] *Id.* at 354 (quoting Whren v. United States, 517 U.S. 806, 818 (1996)).
[215] Atwater v. City of Lago Vista, 532 U.S. 318, 355 (2001).

practice perhaps suggested that its interpretation of the Fourth Amendment would not disrupt sound policing practices.

The Court recently expressed even greater trust in state legislatures in *Hiibel v. Sixth Judicial District Court*,[216] as it set forth a relationship between state law and the Fourth Amendment that allows states to expand the scope of a police officer's authority during an investigatory stop. In affirming its trust in state legislatures, the Court this time safeguarded a practice authorized by a minority of state legislatures.[217]

B. *Citing a Minority of State Laws to Justify a Broader Investigatory Stop Rule:* Hiibel v. Sixth Judicial District Court

A divided Court in *Hiibel v. Sixth Judicial District Court*[218] authorized states to expand their investigatory powers. In a fact-specific holding, the Court determined that a Nevada statute, as interpreted by the state's highest court, did not violate the Fourth Amendment when it required an individual to disclose his name to a police officer who had reasonable suspicion that the individual had engaged in criminal activity.[219] In upholding the state statute, the Court balanced the government's interest against the individual's interests[220] as it had done in *Terry v. Ohio*,[221] which created a reasonable suspicion standard for both forcible investigatory stops and pat-downs of suspects.[222] More importantly, it accomplished this balance with a large thumb on the states' side of the scale, trusting states to have wise policing practices.

In *Hiibel*, two state statutes led to a suspect's conviction for resisting a public officer. One statute imposed on suspects during a *Terry* stop the legal obligation of disclosing their name,[223] and the

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[216] 124 S. Ct. 2451, 2459 (2004).

[217] *Id.* at 2456.

[218] *Id.* at 2459. Justice Kennedy wrote the majority opinion, declaring a state statute valid under the Fourth and Fifth Amendments to the United States Constitution. *Id.* at 2455-61. Justice Stevens dissented, arguing that the statute violated the Fifth Amendment. *Id.* at 2661-64 (Stevens, J., dissenting). Justice Breyer, joined by Justices Souter and Ginsburg dissented, contending that the statute violated the Fourth Amendment. *Id.* at 2464-66 (Breyer, J., dissenting).

[219] *Id.* at 2459-60.

[220] *Id.* at 2459.

[221] 392 U.S. 1, 24-27 (1968).

[222] For a discussion of *Terry*, see *infra* text accompanying notes 235-37 & 243-45.

[223] NEV. REV. STAT. § 171.123 (2003). The statute provides as follows:

> 1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . . .

other statute criminalized "willfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office."[224] When Larry Hiibel refused to reveal his name to an officer who had reasonable suspicion that Hiibel had committed an assault, he was charged with and convicted of resisting a public officer, a misdemeanor.[225] Mr. Hiibel challenged his conviction, alleging that the state's identification requirement violated both the Fourth and Fifth Amendments[226] to the United States Constitution.[227] The Court upheld his conviction,[228] and it dramatically deferred to state police power in its interpretation of the Fourth Amendment.

When interpreting the Fourth Amendment, the Court had to confront dicta from numerous decisions suggesting that a suspect may remain silent without penalty during an investigatory stop.[229]

> 3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer.
> 4. A person may not be detained longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes.

Id.

[224] NEV. REV. STAT. § 199.280 (2003). Under the statute, individuals commit a felony if they also use a weapon to resist, obstruct, or delay; otherwise, such conduct would constitute a misdemeanor:

> A person who in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished:
>
> > 1. Where a dangerous weapon is used in the course of such resistance, obstruction, or delay, for a category D felony . . . .
> > 2. Where no dangerous weapon is used in the course of such resistance, obstruction or delay, for a misdemeanor.

Id.

[225] *Hiibel*, 124 S. Ct. at 2455-56. The officer also arrested Mr. Hiibel for domestic battery, but the state dismissed this charge prior to trial. Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1203 n.1 (Nev. 2002), *aff'd*, 124 S. Ct. at 2461.

[226] The Court's analysis of the Fifth Amendment falls outside the scope of this Article.

[227] *Hiibel*, 124 S. Ct. at 2456.

[228] *Id.* at 2460-61. For his misdemeanor conviction, Hiibel received a fine of $250 and incurred a $70 administrative fee. Brief in Opposition to Petition for Writ of Certiorari at 4, Hiibel v. Sixth Judicial Dist. Court, 540 U.S. 965 (2003) (No. 03-5554).

[229] *Hiibel*, 124 S. Ct. at 2458-59. In *Hiibel*, eight justices acknowledged dicta in opinions indicating that a suspect during an investigatory stop may remain silent. The majority opinion dismissed language in two decisions, and three dissenting justices cited four decisions. The majority referred to Justice White's concurring opinion in *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring), and *Berkemer v.*

The Court surprisingly characterized these dicta as consistent with suspects' obligation to disclose their names. It did so by assigning different roles to the Fourth Amendment and to state law. The Court explained that "the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions."[230] For the Court, "the source of the legal obligation" was "Nevada state law, not the Fourth Amendment."[231]

The Court's dichotomy, at some level, resembled classic roles for the Fourth Amendment and state law with respect to a state's power to define substantive crimes,[232] to grant arrest powers,[233] and to select appropriate penalties. Yet the Court gave the Fourth Amendment a limited role in this context. The Court's discussion ultimately reflected deep trust in state legislatures, even though it did purport to subject the mandatory identification statute to Fourth Amendment scrutiny.

While addressing the Fourth Amendment standard for investigatory stops, the Court revisited the balancing model it had used in *Terry v. Ohio*,[234] which broke new ground in 1968 by interpreting the Fourth Amendment to have a reasonable suspicion standard for investigatory stops and frisks.[235] Under *Terry*, the Fourth Amendment permits officers to forcibly stop individuals when they have reasonable suspicion to believe that "criminal activity may be afoot." The *Terry* Court also declared that officers may "conduct a carefully limited search of the [suspect's] outer clothing" if the

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McCarty, 468 U.S. 420, 439 (1984). *Hiibel*, 124 S. Ct. at 2459. The dissent cited *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Brennan, J., concurring) and *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), in addition to *Terry* and *Berkemer*. *Hiibel*, 124 S. Ct. at 2465 (Breyer, J., dissenting).

[230] *Hiibel*, 124 S. Ct. at 2459.

[231] *Id.*

[232] *See, e.g.*, *Berkemer*, 468 U.S. at 436 ("Under the law of most States, it is a crime either to ignore a policeman's signal to stop one's car or, once having stopped, to drive away without permission.").

[233] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 337 (2001) ("During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace.") (internal citations omitted); *Berkemer*, 468 U.S. at 437 n.26 ("State laws governing when a motorist detained pursuant to a traffic stop may or must be issued a citation instead of taken into custody vary significantly, but no State requires that a detained motorist be arrested unless he is accused of a specified serious crime, refuses to promise to appear in court, or demands to be taken before a magistrate.") (internal citations omitted).

[234] 392 U.S. 1, 30 (1968).

[235] *Hiibel*, 124 S. Ct. at 2458-61.

officers have reasonable suspicion that the suspect is "armed and presently dangerous."[236] The *Terry* Court derived this standard by balancing the government's need for investigatory stops against an individual's "inestimable right of personal security."[237]

Nevertheless, when the *Hiibel* Court applied this balancing standard, it did not characterize an individual's interest in maintaining silence, other than nominally noting that the demand for identification did not lengthen the stop, nor change "its location."[238] The Court did, however, describe the government's interest in knowing a suspect's name as an "important government" interest.[239] In giving weight to the government's side of the scale, the Court was concerned that a suspect may have a "record of violence or mental disorder."[240] In the area of domestic assault cases, the Court listed specific concerns of officer safety and "possible danger to the potential victim."[241] The Court also declared that "identity may inform an officer that a suspect is wanted for another offense."[242]

The *Hiibel* Court also invoked the two-part inquiry in *Terry* that framed its balancing of interests: a police officer's actions "must be '"justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place."'"[243] For the Court, the officer's demand for identification furthered the legitimate purposes of the investigatory stop because the officer had reasonable suspicion of criminal activity, as opposed to a forcible stop without such suspicion.[244] The Court concluded that the balancing "principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop."[245] In short, the Fourth Amendment did not require disclosure; it only permitted a state law to authorize mere disclosure.

Although the *Hiibel* Court considered the constitutionality of the Nevada statute, it also cited other "stop and identify" statutes enacted

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[236] *Terry*, 392 U.S. at 30.

[237] *Id.* at 8-9.

[238] *Hiibel*, 124 S. Ct. at 2459.

[239] *Id.* at 2458.

[240] *Id.*

[241] *Id.*

[242] *Id.* Ironically, in discussing the Fifth Amendment, the Court declared that identity disclosure was not "incriminating," except in "unusual circumstances." *Id.* at 2461. The Court expressly deferred to the "Nevada Legislature's judgment . . . that the disclosure would [not] tend to incriminate [a suspect]." *Id.*

[243] *Id.* at 2458 (quoting United States v. Sharpe, 470 U.S. 675, 682 (1985) (quoting *Terry*, 392 U.S. at 20)) (alteration in original).

[244] *See* Hiibel v. Sixth Judicial District Court, 124 S. Ct. 2451, 2460 (2004).

[245] *Id.* at 2459.

in a minority of states.[246] It characterized these statutes as combining "vagrancy laws" with the limits created by *Terry*.[247] By citing these statutes, the Court needed to address decisions that had struck down vagrancy laws as void for vagueness,[248] even though the suspect did not raise this issue in *Hiibel*.[249] The Court quickly distinguished its present case by noting that unlike prior decisions, this case involved a statute that required police officers to have reasonable suspicion for a forcible stop, and it saw the Nevada Supreme Court's opinion as clearly interpreting the statute's requirements.[250] The Court quoted the lower court opinion, which interpreted the statute to require a suspect to "state his name to an officer."[251] The *Hiibel* Court added its own nuance to the lower court's construction when it assumed that the statute did not require a suspect to have a "driver's license or any other document."[252]

As the Court examined state statutes in twenty states, it referred to similarities and differences. It broadly described the similarities: "all permit an officer to ask or require a suspect to disclose his identity."[253] As it discussed the differences, it briefly noted their historical sources, such as the Uniform Arrest Act and the Model Penal Code.[254] It also described variations in the legal significance given to a defendant's failure to provide identification: some states made nondisclosure a misdemeanor, some a "civil violation," and others used it as a "factor" in ascertaining whether a person was

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[246] *Id.* at 2456.

[247] *Id.*

[248] *Id.* at 2457. The Court referred to the statute in *Brown v. Texas*, 443 U.S. 47, 52 (1979), which violated the Fourth Amendment because the stop did not involve reasonable suspicion as required by *Terry*. *Hiibel*, 124 S. Ct. at 2457. The Court also mentioned *Kolender v. Lawson*, 461 U.S. 352, 360 (1983), which declared a California statute facially void for vagueness because requiring a suspect to produce "credible and reliable" identification did not provide a sufficiently clear standard for compliance. *Hiibel*, 124 S. Ct. at 2457.

[249] *Id.*

[250] *Id.*

[251] *Id.* (quoting Hiibel v. Sixth Judicial Dist. Court, 59 P.3d 1201, 1206 (2002)).

[252] *Hiibel*, 124 S. Ct. at 2457. The Nevada Supreme Court never mentioned "a driver's license or any other document for identification." *See Hiibel*, 59 P.3d at 1206. When officers have probable cause for a vehicle violation, some states have afforded officers discretion in deciding what constitutes sufficient documentation. *See, e.g.*, People v. McKay, 41 P.3d 59, 72 (Cal. 2002) (upholding officer's discretion to arrest person who had been riding his bicycle in the wrong direction, even though he disclosed his name and birth date, because he failed to comply with California statute requiring person to provide "a driver's license or other satisfactory evidence of his identity for examination" (citing CA. VEH. CODE § 40302(a) (West 2000))).

[253] *Hiibel*, 124 S. Ct. at 2456.

[254] *Id.*

loitering.[255] With respect to other states, the Court, without any citation to specific statutes or cases, tersely stated, "a suspect may decline to identify himself without penalty."[256]

The cited statutes, however, imposed greater disclosure requirements than did the specific holding in *Hiibel*. For example, some statutes stated that an officer may "demand" or require a person during an investigatory stop to provide an address,[257] to explain conduct,[258] to give "identification if available,"[259] or to state business abroad and destination.[260] The statutes that referred to loitering arguably raised classic void for vagueness problems, such as a statute criminalizing the actions of a person who "[l]ingers, remains or prowls in a public place or the premises of another without apparent reason and under circumstances that warrant alarm or concern for the safety of persons or property in the vicinity . . . ."[261] The loitering statutes characterized as a suspicious circumstance a suspect's refusal to identify himself as well as failure to give a "reasonably credible account of his presence and purpose."[262] One of the cited loitering statutes provided that "[f]ailure to identify or account for oneself, absent other circumstances, however, shall not

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[255] *Id.*

[256] *Id.*

[257] ARK. CODE ANN. § 5-71-213(a)(1) (2004); COLO. REV. STAT. § 16-3-103(1) (2003); DEL. CODE ANN. tit. 11, § 1902(a) (2003); 725 ILL. COMP. STAT. 5/107-14 (2004); KAN. STAT. ANN. § 22-2402(1) (2003); LA. CODE CRIM. PROC. ANN. art. 215.1(A) (2004); MO. REV. STAT. § 84.710(2) (2003); NEB. REV. STAT. § 29-829 (2003); N.H. REV. STAT. ANN. § 594:2 (2003); N.Y. CRIM. PROC. LAW § 140.50(1) (McKinney 2004); N.D. CENT. CODE § 29-29-21 (2003); R.I. GEN. LAWS § 12-7-1 (2003); UTAH CODE ANN. § 77-7-15 (2003); WIS. STAT. § 968.24 (2003), *cited in Hiibel*, 124 S. Ct. at 2456.

[258] ARK. CODE ANN. § 5-71-213(a)(1); COLO. REV. STAT. § 16-3-103(1); 725 ILL. COMP. STAT. 5/107-14; KAN. STAT. ANN. § 22-2402(1); LA. CODE CRIM. PROC. ANN. art. 215.1(A); NEB. REV. STAT. § 29-829; N.Y. CRIM. PROC. LAW § 140.50(1); N.D. CENT. CODE § 29-29-21; UTAH CODE ANN. § 77-7-15; WIS. STAT. § 968.24, *cited in Hiibel*, 124 S. Ct. at 2456.

[259] COLO. REV. STAT. § 16-3-103(1), *cited in Hiibel*, 124 C. Ct. at 2456.

[260] DEL. CODE ANN. tit. 11, § 1902(a); MO. REV. STAT. § 84.710(2); N.H. REV. STAT. ANN. § 594:2; R.I. GEN. LAWS § 12-7-1, *cited in Hiibel*, 124 S. Ct. at 2456.

[261] ARK. CODE ANN. § 5-71-213(a)(1), *cited in Hiibel*, 124 S. Ct. at 2456. The Court cited four other loitering or prowling statutes, all similar to the Arkansas statute: DEL. CODE ANN. tit. 11, § 1321(6) (2003); FLA. STAT. § 856.021(2) (2003); GA. CODE ANN. § 16-11-36(b) (2003); N.H. REV. STAT. ANN. § 644:6 (2003). *Hiibel*, 124 S. Ct. at 2456. These statutes also provided a defense when an officer failed to give a suspect the opportunity to speak. *See, e.g.*, ARK. CODE. ANN. § 5-71-213(d) ("It shall be a defense to prosecution under . . . this section that the law enforcement officer did not afford the defendant an opportunity to identify himself and explain his presence and conduct . . . .").

[262] ARK. CODE ANN. § 5-71-213(a)(1), *cited in Hiibel*, 124 S. Ct. at 2456.

be grounds for arrest."[263] In addition, one state statute focused on the "petty misdemeanor" of concealed identity. "Concealing identity consists of concealing one's true name or identity . . . with intent to intimidate, hinder, or interrupt any public officer . . . in a legal performance of his duty . . . ."[264] By contrast, one state statute indicated an officer "may request" a driver's name and address, an explanation of conduct, as well as a "driver's license and the vehicle's registration and proof of insurance."[265] In the end, only a few statutes may be constitutional, under the Fourth, Fifth, and Fourteenth Amendments, if the Court were to later refuse to extend *Hiibel*'s reasoning to other contexts.[266]

The Court did not canvas the "stop and identify" statutes from all states, but instead cited statutes listed in an amicus brief[267] that contended that the Nevada identification statute violated the Fourth Amendment. Although the omitted statutes both barred[268] and

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[263] N.H. REV. STAT. ANN. § 644:6, *cited in Hiibel*, 124 S. Ct. at 2456.

[264] N.M. STAT. ANN. § 30-22-3 (2004), *cited in Hiibel*, 124 S. Ct. at 2456. The New Mexico Court of Appeals has interpreted this statute as requiring more than disclosure of one's name during a lawful traffic stop, an event for which an officer has probable cause as opposed to just reasonable suspicion. State v. Andrews, 934 P.2d 289, 293 (N.M. Ct. App. 1997). The *Andrews* decision specifically left open "other situations." *Id.* The decision, however, also contains broad statutory interpretative language:

> Identity is not limited to name alone. The use of the disjunctive word "or" indicates that failing to give either name or identity may violate the statute. There would be no reason for the legislature to include the word "identity" if it carried the same meaning as "name." . . . Given the language of the statute, we hold that [the speeding driver] was prohibited from concealing information pertaining to his "identity," which in this case necessarily includes more than just a correct name.

Id. at 291 (citations omitted). *See also* State v. Dawson, 983 P.2d 421, 423, 426 (N.M. Ct. App. 1999) (upholding conviction under the same statute when detainee delayed in revealing his name when officer had reasonable suspicion or "even probable cause" due to missing license plate on motor vehicle driven by detainee, and stating that "[o]ne could infer that concealment for any period of time, however short, violates the statute").

[265] MONT. CODE ANN. § 46-5-401 (2003), *cited in Hiibel*, 124 S. Ct. at 2456.

[266] Although Justice Breyer in his dissent did not refer to these broader statutes, he nonetheless questioned whether the Court would later permit states to grant officers the authority to compel responses to other questions. 124 S. Ct. at 2465-66 (Breyer, J., dissenting). Justice Breyer specifically referred to compelled disclosure of a "license number" and address and wondered whether an officer can "keep track of the constitutional answers." *Id.*

[267] Brief of the Cato Institute as Amicus Curiae in Support of Petitioner app., Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554), 2003 WL 22970845.

[268] GUAM CODE ANN. tit. 8, § 30.20 (2003). Guam's investigatory stop statute states that a "person shall not be compelled to answer any inquiry of the peace officer." *Id.*

allowed compelled disclosure of identity,[269] the Court never referred to similar ordinances,[270] despite their inclusion in the amicus brief.[271] By granting states the authority to decide whether to create this "legal obligation" to disclose, the Court thus failed to address the lack of uniformity that will now exist between states and their municipalities.[272]

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[269] *See, e.g.*, CAL. PENAL CODE § 647(e) (West 2003). After the United States Supreme Court declared an older California loitering statute facially unconstitutionally vague in *Kolender v. Lawson*, 461 U.S. 352, 361 (1983), the California legislature did not repeal the statute, but did adopt gender neutral language and changed "such" to "this":

> Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:
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> . . . .
>
> Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself or herself and to account for his or her presence when requested by any peace officer so to do, if the surrounding circumstances would indicate to a reasonable person that the public safety demands this identification.

CAL. PENAL CODE § 647(e). The Court also did not cite two statutes from Guam, one which addressed investigatory stops and the other the offense of loitering. GUAM CODE ANN. tit. 8, § 30.10 (2003) (investigatory stops); GUAM CODE ANN., tit. 9, § 61.30 (2003) (a loitering statute that makes refusal "to identify" oneself a circumstance for an officer to consider when deciding whether loitering has occurred, provided that the officer gave the suspect an opportunity to "identify himself and explain his presence and conduct"). A loitering statute from the Virgin Islands also imposed an identification duty. V.I. CODE ANN. tit. 14, § 1191(1) (2003) (punishing an individual who "loiters, remains or wanders in or about a place without apparent reason and under circumstances which reasonably justify suspicion that he may be engaged or about to engage in crime, and, upon inquiring by a police officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purpose").

[270] *See, e.g.*, Brief of the Cato Institute as Amicus Curiae in Support of Petitioner app., Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554), 2003 WL 22970845 (citing CHICAGO, ILL., MUN. CODE § 2-84-310 (2003) (during certain investigatory stops, officer "may demand the name and address of [a suspect] and an explanation of his actions"); ST. PAUL, MINN., CODE § 225.11 (2003) (during investigatory stops for felonies or an "offense involving the use of a weapon of any kind, [an officer] may demand of [the suspect] his name, address, and an explanation of his actions"); MO. ANN. STAT. § 84.710 (West 2003) (during investigatory stops, an officer may "demand" a suspect's "name, address, business abroad and whither he is going"); ARLINGTON, VA., CODE § 17-13 (2003) (officer may in a public place demand a suspect's identification to further public safety, depending on "surrounding circumstances").

[271] Brief of the Cato Institute as Amicus Curiae in Support of Petitioner app, Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451 (2004) (No. 03-5554), 2003 WL 22970845.

[272] An amicus brief urged the Court to strike down the Nevada statute, citing "the cumulative effect that the patchwork of state, county, and local ordinances will have upon the right to remain silent." *Id.* at 16. The brief described a new burden that lawyers face after *Hiibel*: "Justice Robert Jackson once remarked that '[a]ny lawyer

Ironically, this lack of uniformity may be short lived if states currently lacking a stop and identify statute enact one for investigatory stops or amend other related statutes.[273] States may also choose to interpret their obstruction statutes to incorporate *Hiibel*'s "legal obligation." Before *Hiibel*, some states interpreted their obstruction statutes to require disclosure of one's name during an investigatory stop,[274] some states had refused to do so,[275] others had

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worth his salt will tell suspects in no uncertain terms to make no statement to police under any circumstances.' If the Nevada statute (and others like it) are sustained, such advice will no longer be sound." *Id.* (citation omitted). *See also* Risbridger v. Connelly, 275 F.3d 565, 569 n.3 (6th Cir. 2002) (noting the difference between Michigan's obstruction statute and East Lansing's obstruction ordinance: the statute "proscribe[s] only actual or threatened physical interference with an officer," but the ordinance "makes it unlawful to assault, obstruct, resist, hinder or oppose an officer, [and] does not as whole imply that physical interference is required to establish a violation").

[273] *See, e.g.*, Adams v. Praytor, No. Civ.A.303CV0002N, 2004 WL 1490021, at *4 n.1 (N.D. Tex. July 1, 2004). In *Adams*, a federal district court both cited *Hiibel* and noted that Texas' failure-to-identify statute only applied to individuals already arrested: "*Hiibel* addresses the topic of what the Constitution permits, not what Texas statutes make unlawful. Here, the Texas Penal Code did not make [the individual's] failure to identify himself unlawful" when the officer arrested him for failing to identify himself. *Id.* at *6 n.2 (citing TEX. PENAL CODE ANN. § 38.02 (Vernon 2003). Under the Texas identification statute, a state may prosecute the failure to disclose one's "name, residence address, or date of birth" after officers "lawfully arrest the person and request the information." TEX. PENAL CODE ANN. § 38.02(a).

[274] *See, e.g.*, Oliver v. Woods, 209 F.3d 1179, 1188-89 (10th Cir. 2000). In *Oliver*, the United States Court of Appeals for the Tenth Circuit upheld a suspect's conviction under Utah's obstruction statute and noted that the Utah identification statute (later cited by the *Hiibel* Court, 124 S. Ct. at 2456 (citing UTAH CODE ANN. § 77-7-15 (2003)) did not provide for any "criminal sanctions." *Oliver*, 209 F.3d at 1188 n.8. Instead of using Utah's identification statute to create a "legal obligation" to disclose one's name during an investigatory stop, the Tenth Circuit relied *only* on the obstruction statute. *Id.* at 1188-89 (citing UTAH CODE ANN. § 76-8-305). The Utah obstruction statute provided in part as follows:

> A person is guilty of a class B misdemeanor if he has knowledge, or by the exercise of reasonable care should have knowledge, that a peace officer is seeking to effect a lawful arrest or *detention* of that person or another and interferes with the arrest or *detention* by:
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> . . . .
>
> (3) the arrested person's or another person's refusal to refrain from performing any act that would impede the arrest or *detention*.

UTAH CODE ANN. § 76-8-305 (2004) (emphasis added). The *Oliver* Court interpreted Utah's obstruction statute to apply to the lawful detention of an investigatory stop and a suspect's refusal to identify himself. 209 F.3d at 1189.

By considering New Mexico's concealed identity statute, the Tenth Circuit has also upheld a conviction for a suspect's refusal to disclose his name during an investigatory stop. Albright v. Rodriguez, 51 F.3d 1531, 1537 (10th Cir. 1995) (quoting N.M. STAT. ANN. § 30-22-3, which criminalizes the concealing of one's identity "with intent to obstruct the due execution of the law or with intent to

intimidate, hinder or interrupt any public officer or any other person in a legal performance of his duty").

Similarly, a federal district court, without using a state identification statute, stated that Georgia's obstruction statute would support a conviction for obstruction when a person refuses "to provide identification" during an investigatory stop. Gainor v. Douglas County, 59 F. Supp. 2d 1259, 1282 (N.D. Ga. 1998).

[275] *See, e.g.*, *Praytor*, 2004 WL 14900021, at *4 n.1 (stating that the Texas statute prohibiting interfering with a peace officer's duties has an explicit exception for failing to identify: "'It is a defense to prosecution under this section that the interruption, disruption, impediment, or interference alleged consisted of speech only'" (quoting TEX. PENAL CODE ANN. § 38.15(d) (Vernon 2003)); State v. Woodring, Nos. 96-0831-CR, 96-0834-CR, 96-0832-CR, 96-0833-CR, 1996 WL 653703, at *1-2 (Wis. Ct. App. Nov. 12, 1996) (stating that the obstruction statute does not apply even when officers have probable cause to believe that a person trepassed and refused to provide identification, and citing Wisconsin jury instruction on obstruction; also noting that "[f]urther expansion to cover simple refusal to answer questions should be done, if done at all, only by direct and carefully focused legislative action" (internal quotation marks omitted)); Henes v. Morrissey, 533 N.W.2d 802, 807-08 (Wis. 1995) (even though state identification statute indicated that an officer may "demand" suspect's name, interpreting state obstruction statute to bar officers from elevating "reasonable suspicion that [a suspect] committed the car theft to probable cause that he obstructed their investigation" simply because the suspect refused to identify himself (citing WIS. STAT. § 968.24 (identification statute cited in *Hiibel*, 124 S. Ct. at 2456) and WIS. STAT. § 946.41 ("resisting or obstructing officer" statute))). The *Henes* Court further noted that the suspect had not given false information, had not fled when seeing the officers, nor acted violently; the suspect had simply remained silent when asked for identification. *Henes*, 533 N.W.2d at 808. *See also* United States v. Brown, 731 F.2d 1491, 1494 (11th Cir. 1984) (stating that suspects' "refusal to furnish identification—which they were entitled to do if indeed this was a *Terry* stop . . . may have created suspicion that they had actually used false names, but falls far short of probable cause" to believe that they violated Georgia's false name statute, and noting that suspects had responded to officers' request to see their airline tickets, which contained the false names used to identify themselves).

In contrast to decisions construing state statutes to strike down convictions arising from a suspect's refusal to identify, some courts interpreted the Fourth Amendment to bar such convictions. After *Hiibel*, these decisions do not necessarily resolve the question whether a particular state statute created the "legal obligation" to disclose as permitted in *Hiibel*. For example, before *Hiibel*, the Ninth Circuit Court of Appeals examined the two Nevada statutes at issue in *Hiibel*, declaring that they could not support a conviction for obstruction as applied to the facts of the case because they violated the Fourth Amendment. Carey v. Nevada Gaming Control Bd., 279 F.3d 873, 879 (9th Cir. 2002). Because *Hiibel* specifically declared that the Nevada identification statute comported with the Fourth Amendment, 124 S. Ct. at 2459, *Carey* no longer has vitality. Other decisions decided on Fourth Amendment grounds will still require inquiry as to whether a particular state statute created a "legal obligation" to disclose. *See, e.g.*, Martinelli v. City of Beaumont, 820 F.2d 1491, 1494 (9th Cir. 1987) (holding that jury instruction stating that person could be prosecuted under California obstruction statute for refusal to identify oneself during an investigatory stop violated the Fourth Amendment).

compelled disclosure under certain circumstances,[276] and others had left the question open.[277] Because obstruction and similar statutes currently exist in all states, *Hiibel* will dramatically impact state authority in states that interpret their statutes to include a legal duty to disclose one's name.[278]

In trusting the states to create appropriate legal obligations, the Court did not mention how individuals will know when they have a Fourth Amendment right to be silent during an "encounter" as opposed to an investigatory stop.[279] Under the Court's Fourth Amendment jurisprudence, no state statute could compel and punish

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[276] *See, e.g.*, State v. Srnsky, 582 S.E.2d 859, 868 (W. Va. 2003) ("[T]he charge of obstructing an officer may be substantiated when a citizen does not supply identification when required by express statutory direction or when the refusal occurs after a law enforcement officer has communicated the reason why the citizen's name is being sought in relation to the officer's official duties.") The court in *Srnsky* also noted that "motorists are statutorily required as a condition of using public roadways to comply with orders of law enforcement officers." *Id.* n.15 (citing W. VA. CODE ANN. § 17C-2-3).

[277] *See, e.g.*, Shepard v. Ripperger, No. 02-1939, 2003 WL 192101, at *2 (8th Cir. Jan. 19, 2003) (granting officers qualified immunity because law was not "clearly established about whether refusing to identify oneself [during an investigatory stop] provides probable cause for arrest" under the Iowa statute barring interfering with official acts).

[278] *But see* People v. Brito, No. 200NY013984, 2004 WL 1488404, at *1 (N.Y. Crim. Ct. June 22, 2004). In *Brito*, a New York state court interpreted its obstruction statute to apply to individuals "committing felonies or misdemeanors, and not traffic infractions." *Id.* at *2. Yet, when the passenger, who had not worn her seatbelt, refused to identify herself, the court upheld the officer's authority to arrest her for the seatbelt violation. *Id.* (citing Atwater v. City of Lago Vista, 532 U.S. 318 (2001)).

[279] *See, e.g.*, Holt v. State, 487 S.E.2d 629, 632-33 (Ga. Ct. App. 1997). In *Holt,* the Georgia Court of Appeals held that, under the state's false identity statute, because an officer lacked reasonable suspicion of criminal activity, he could not lawfully arrest a passenger in a lawfully stopped car for giving him a false name and birth date. *Id.* By contrast, the dissent viewed the facts as raising reasonable suspicion, viewing the arrest as valid under the state statute. *Id.* at 635 (Smith, J., dissenting). *See also* Iowa v. Hauan, 361 N.W.2d 336, 340-41 (Iowa 1984). In *Hauan*, officers executed a search warrant at a private club and restaurant, looking for evidence of illegal liquor sales and prostitution. *Id.* at 337-38. The officers informed the patrons of their investigation and asked their names. *Id.* Officers arrested a patron who refused to disclose his identity, contending that he violated a state statute criminalizing interfering with official acts. *Id.* at 338. The Iowa Supreme Court reversed the conviction, relying on dicta in both *Terry* and *Berkemer*, *id.* at 340, which were characterized by the *Hiibel* majority as describing only the Fourth Amendment, not legal obligations imposed by a state statute. *See Hiibel*, 124 S. Ct. at 2459; *supra* note 230 and accompanying text. Because the officers lacked reasonable suspicion, the Iowa court upheld the patron's right to remain silent: "This is not a country where an individual must present his or her green card and proper papers at the whim of a law officer, or face jail." *Hauan*, 361 N.W.2d at 341. Ironically, the dissent invoked *Terry*, stating that officers had reason to believe that a patron may be a witness or "a possible defendant," one that does not need to know the "nature of the investigation." *Id.* (Donielson, J., dissenting).

individuals for failing to disclose their names when an officer lacks reasonable suspicion of criminal activity.[280] Making a request in this context would constitute a consensual encounter.[281] Yet, if the officer has reasonable suspicion of criminal activity and forcibly stops an individual, then the detainee's refusal to disclose his name—if a state statute or ordinance creates a legal obligation—might constitute obstruction. In short, the Court's decision allows police officers who have reasonable suspicion of one criminal offense to convert reasonable suspicion into probable cause for another offense—obstruction. Yet, a citizen typically does not know what information police officers possess during a stop.

The Court thus trusted states (and impliedly municipalities) to decide whether to create the legal obligation to disclose one's identity to an officer during an investigatory stop. Yet, almost two decades prior to *Hiibel*, in *Tennessee v. Garner*,[282] the Court only rhetorically deferred to state practices while it more sharply limited states' authority to use deadly force in seizing suspects.

C. *Constructing a "Trend" in State Practices to Limit Deadly Seizures:* Tennessee v. Garner

In *Tennessee v. Garner*, the Court also invoked modern state police practices in determining the reasonableness of using deadly force to seize suspects.[283] In doing so, the Court carefully framed the practices of states to suggest that they supported the Court's new standard:

> [I]f the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.[284]

The Court also justified its standard by citing the deadly-force policies from the "majority of large cities."[285] Additionally, the Court used

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[280] *See, e.g.*, *Srnsky*, 582 S.E.2d at 868 (holding "that refusal to identify oneself to a law enforcement officer does not, standing alone, form the basis for a charge of obstructing a law enforcement officer in performing official duties").

[281] *See, e.g.*, State v. Smith, No. 03-1062, 2004 WL 1336301, at *4 (Iowa June 16, 2004) (stating that after officer completed traffic citation against driver, his request of a passenger to provide identification occurred during a consensual encounter, which led to discovery of an outstanding warrant and passenger's possession of illegal drugs).

[282] 471 U.S. 1 (1985).

[283] *Id.* at 15-20.

[284] *Id.* at 11.

[285] *Id.* at 18.

state and municipal practices to aid in balancing interests.[286] For the Court, the government's self-imposed limit on the use of deadly force tipped the balance towards safeguarding an individual's "fundamental interest in his own life."[287]

The *Garner* Court examined a Tennessee statute, which provided that "[if], after notice of the intention to arrest the defendant, he either flees or forcibly resists, the officer may use all the necessary means to effect the arrest."[288] The Court noted that the Tennessee Supreme Court had interpreted the statute to prohibit officers from using deadly force to arrest misdemeanants.[289] When evaluating the constitutionality of the Tennessee statute, the Court noted that it reflected the common-law rule, which permitted officers to use deadly force to seize fleeing felons.[290]

The tragic facts of *Garner* aided the Court in striking down the Tennessee statute as applied to these circumstances. While investigating a nighttime burglary of a residence, a police officer heard the house door slam and watched a person run across the backyard, stopping at a six-foot-high fence.[291] Using a flashlight, the officer saw a youth's "face and hands" and "figured that [the suspect] was unarmed."[292] The officer shouted "police, halt!"[293] When Garner began climbing the fence, the officer shot him in the head.[294] The fifteen-year-old Garner later died.[295] The officer's shooting complied with both the Tennessee statute[296] and the common-law rule.[297]

The Court declared that this deadly seizure violated the Fourth Amendment by explicitly rejecting the common-law rule[298] as well as early state practices.[299] The Court admitted that it had previously

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[286] *Id.* at 19-20

[287] *Id.* at 9.

[288] Tennessee v. Garner, 471 U.S. 1, 4-5 (1985) (citing TENN. CODE ANN. § 40-7-108 (1982)).

[289] *Id.* at 5 n.5 (citing Johnson v. State, 114 S.W.2d 819 (Tenn. 1938)).

[290] *Id.* at 12.

[291] *Id.* at 3.

[292] *Id.*

[293] *Id.* at 4.

[294] Tennessee v. Garner, 471 U.S. 1, 4 (1985).

[295] *Id.* at 4 nn.2 & 3.

[296] *Id.* at 4.

[297] *Id.* at 12.

[298] *Id.* (admitting that it had "often looked to the common law in evaluating" Fourth Amendment reasonableness).

[299] *Id.* (noting that "[m]ost American jurisdictions also imposed a flat prohibition against the use of deadly force to stop a fleeing misdemeanant, coupled with a general privilege to use such force to stop a fleeing felon").

used both the common law and early state practices to evaluate law enforcement procedures under the Fourth Amendment.[300] The Court characterized these older practices as conflicting with modern police practices, which are more protective of a suspect's interest in life.[301] The Court seemed to justify scrutiny of modern practices on three grounds. First, modern practices informed the Court as to how to assess the gravity of the states' interests in seizing suspects.[302] Second, modern practices revealed a dramatic reclassification from the common law as to what currently constitutes a misdemeanor or a felony.[303] Finally, they revealed a "sweeping change" in technology.[304]

To describe modern police practices, the Court canvassed all states, but in doing so, it carefully skewed the data to support its holding.[305] It listed twenty-three states as having the common-law rule,[306] twenty-two as not using the common-law rule,[307] and four states with unclear positions.[308] The Court admitted that "[i]t cannot be said that there is a constant or overwhelming trend away from the common-law rule."[309] Despite this admission, the Court summarized state practices by declaring that the common-law practice "remains the rule in *less than half the States*."[310] In short, the four undeclared states, which might have, through time, ultimately adopted the common- law rule, did not count. Instead the Court made this statement, knowing that the states had split on the issue, with twenty-three in favor of and twenty-two against the common-law practice.

To bolster its analysis of modern state police practices, the Court also cited a number of other sources: deadly force policies in "large cities;"[311] the policy of the Federal Bureau of Investigation;[312] the association that accredits police departments;[313] and, most importantly, the Model Penal Code, which the Court ultimately adopted as the Fourth Amendment standard for the use of deadly

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[300] Tennessee v. Garner, 471 U.S. 1, 15-16 (1985).
[301] *Id.* at 15-19.
[302] *Id.* at 19.
[303] *Id.* at 14.
[304] *Id.* at 13-15 (noting that "[t]he common-law rule developed at a time when weapons were rudimentary").
[305] *Id.* at 15-18.
[306] Tennessee v. Garner, 471 U.S. 1, 16-17 & nn. 15 & 16 (1985).
[307] *Id.* at 16-17 & nn.17-19.
[308] *Id.* at 17 & n.20.
[309] *Id.* at 18.
[310] *Id.* (emphasis added).
[311] *Id.* at 18-19.
[312] Tennessee v. Garner, 471 U.S. 1, 18, 21 (1985).
[313] *Id.* at 18.

force, a construction explicitly adopted by two states and similar to statutes in eighteen others.[314] In addition, the Court cited research indicating that "only 7.5% of departmental and municipal policies explicitly permit the use of deadly force against any felon. . . [while] 86.8% explicitly do not."[315] After listing and characterizing state and municipal practices, the Court used them to shape its assessment of the Fourth Amendment standard: "In light of the rules adopted by those who must actually administer them, the older and fading common-law view is a dubious indicium of the constitutionality of the Tennessee statute . . . ."[316]

The Court also explained that modern police practices aided balancing interests, a task necessarily implied by the Fourth Amendment reasonableness standard.[317] The majority acknowledged the importance of providing officers with the law enforcement tools they need: "We would hesitate to declare a police practice of long standing unreasonable if doing so would severely hamper effective law enforcement."[318] Nonetheless, the Court characterized the government's interests as less weighty as a result of the self-imposed limitations of states and cities.[319] By doing so, the Court candidly admitted that it assumed that some suspects would elude capture.[320] The Court tersely stated, "[i]t is not better that all felony suspects die than that they escape."[321]

The Court also justified rejecting the common-law rule by looking to other current practices, specifically, the changes in offense classifications and the weapons police officers now carry in aid of their duties.[322] The common-law rule assumed that felons needed immediate capture, which would have involved "hand-to-hand" struggles.[323] The assumption of danger, according to the Court, did not relate to either the modern offense classifications or to the weapons officers may currently use.[324] The Court compared the

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[314] *Id.* at 16-17. The court of appeals in *Garner* had declared that the Model Penal Code "accurately state[d] Fourth Amendment limitations on the use of deadly force against fleeing felons." Garner v. Memphis Police Dep't., 710 F.2d 240, 247 (6th Cir. 1983) (citing MODEL PENAL CODE § 3.07(2)(b) (Proposed Official Draft 1962)).

[315] *Garner*, 471 U.S. at 19 (citations omitted).

[316] *Id.*

[317] *Id.*

[318] *Id.*

[319] *Id.*

[320] *Id.* at 11.

[321] Tennessee v. Garner, 471 U.S. 1, 11 (1985).

[322] *Id.* at 14-15.

[323] *Id.* at 14.

[324] *Id.* at 14-15.

"physical threat" present in the misdemeanor of driving while intoxicated to the danger arising from white-collar felonies.[325] In addition, the Court noted that officers did not begin using "handguns . . . until the latter half of the [nineteenth] century."[326] As a result, the common-law rule, if applied to today, would result in increased physical harm to suspects.[327]

The *Garner* Court thus attempted to justify its balance of interests by relying on current policing practices. In the dissent's view, the Court not only failed to assess the dangerousness of a nighttime burglary of a home, but it also departed from the common-law rule, still in place "in nearly half of the States."[328] More dramatically, the dissent questioned the majority's interest in state practices: "But it should go without saying that the effectiveness or popularity of a particular police practice does not determine its constitutionality."[329] The dissent cited an Eighth Amendment case addressing a state's structuring of the death penalty process: "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws."[330] Yet, the dissent invoked current state practices when declaring that the Court should not require states to provide social science research in support of its practice, particularly when the practice "continues to be accepted by a substantial number of the States."[331] In addition, the dissent failed to mention that its cited Eighth Amendment case, which extensively canvassed state practices, nonetheless recognized an independent federal duty to assess constitutionality.[332]

IV. CONCLUSION: INTERWEAVING RESPECT FOR STATES WITH THE NEED FOR A FEDERAL INDEPENDENT CHECK ON ABUSIVE PRACTICES

The Supreme Court's Fourth Amendment jurisprudence manifests a peculiar interest in deferring to modern state search and seizure laws when determining what constitutes a reasonable police

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[325] *Id.* at 14 n.12.

[326] *Id.* at 15.

[327] Tennessee v. Garner, 471 U.S. 1, 15 (1985).

[328] *Id.* at 23 (O'Connor, J., dissenting).

[329] *Id.* at 28 (O'Connor, J., dissenting).

[330] *Id.* (O'Connor, J., dissenting) (quoting Spaziano v. Florida, 468 U.S. 447, 464 (1984)) (internal quotation marks omitted).

[331] *Id.* (O'Connor, J., dissenting).

[332] *Spaziano,* 468 U.S. at 464 (stating that "[a]lthough the judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment is violated by a challenged practice") (citations omitted).

practice. Under this idea of "federalism," the Court has viewed current state laws as a source for defining the scope of the Fourth Amendment. This interweaving of state practices with federal protections raises important federalism questions, particularly when the context involves criminal law enforcement. State legislators during their election campaigns have often promised to strongly support law enforcement agendas, with little interest in promising to repeal criminal laws that infringe current values. In addition, state court judges today may similarly campaign to preserve law enforcement powers in light of the United States Supreme Court's recent acknowledgment of its new discretion in addressing controversial issues. As a result, the Court's deference to state search and seizure practices may fail to safeguard a politically unpopular group—alleged criminals. In the end, the Court's view of contemporary state practices resembles the horizontal federalism practiced by sovereign state courts, when they look to other state constitutions as a guide when interpreting their own constitutions. Both the United States Supreme Court and state courts ultimately view the practices of a distinct sovereign as an aid in giving meaning to the broad language of the constitutions they are charged with interpreting.

Initially, the Court drew a bright line between federal and state protections when it declared in 1833 that the Bill of Rights applied only to the federal government. This clear line disappeared as the Court limited state criminal processes by selectively incorporating most of the protections in the Bill of Rights under the Due Process Clause of the Fourteenth Amendment. When the Court in 1949 first applied the Fourth Amendment to the states in *Wolf v. Colorado*, it also refused to impose on state criminal processes the exclusionary rule, a federal protection established in the 1914 decision of *Weeks v. United States*, which barred federal officials from using illegally seized evidence to prove a suspect's guilt.[333] The *Wolf* Court relied on the practices of the majority of states, looking at state laws both before and after the *Weeks* decision.[334] The Court stated, "As of today 31 States reject the *Weeks* doctrine, 16 States are in agreement with it."[335] The *Wolf* Court also trusted that states had adequate processes to check police abuse.

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[333] Wolf v. Colorado, 338 U.S. 25, 33 (1949), *overruled by* Mapp. v. Ohio, 367 U.S. 643 (1961).

[334] *Id.* at 29.

[335] *See id.*

The Court changed its view of state search and seizure practices in 1961 when it overruled *Wolf* in *Mapp v. Ohio*, thus making the exclusionary rule applicable to the states.[336] In its reversal, the *Mapp* Court declared that the state practices relied on in *Wolf* were "not basically relevant to" its decision whether the exclusionary rule applied.[337] It viewed the practices cited by the *Wolf* Court as providing an historical, factual grounding.[338] The *Mapp* Court then declared that recent state practices (i.e., those since the *Wolf* decision) provided a better perspective.[339] It noted that "more than one-half" of states had "wholly or partly adopted or adhered to the *Weeks* rule [of exclusion]."[340] Yet, both the majority and the dissent in *Mapp* recognized that state practices were not "controlling"[341] and "beside the point."[342] Instead, the *Mapp* majority looked to the inadequacies of state remedies.[343] In this state-remedy context, the Court canvassed the states, noting that "[l]ess than half of the States have any criminal provisions relating directly to unreasonable searches and seizures."[344] *Mapp* thus ended the "asymmetry which *Wolf* imported into the law."[345] The Fourth Amendment and its exclusionary rule now applied to both federal and state officials.

The *Mapp* Court viewed this harmony between federal and state courts as an example of the "healthy federalism"[346] described in *Elkins v. United States*, decided one year before *Mapp*. *Elkins* had banned federal officials from using evidence seized by state officials in violation of the Fourth Amendment.[347] By not allowing federal officials to receive this evidence on a "silver platter" from state officials (to whom the exclusionary rule did not apply), the *Elkins* Court proclaimed its ban to be wise federalism. Despite this ban, the Court drew a sharp line when it declared that the federal court "must make an independent inquiry, whether or not there has been such an inquiry by a state court."[348] More directly, the Court stated, "[t]he test is one of federal law, neither enlarged by what one state court may

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[336] Mapp v. Ohio, 367 U.S. 643, 660 (1961).
[337] *Id.* at 650.
[338] *Id.* at 651.
[339] *Id.* at 653.
[340] *Id.* at 651.
[341] *Id.* at 653.
[342] Mapp v. Ohio, 367 U.S. 643, 680 (1961) (Harlan, J., dissenting).
[343] *Id.* at 652.
[344] *Id.* at 651-53 & 652 n.7.
[345] *Id.* at 670 (Douglas, J., concurring).
[346] *Id.* at 657 (citing Elkins v. United States, 364 U.S. 206, 221 (1960)).
[347] *Elkins*, 364 U.S. at 213.
[348] *Id.* at 224.

have countenanced, nor diminished by what another may have colorably suppressed."[349]

For the dissent, the bright line in *Elkins*—a federal court's authority to determine whether state officials violated federal law—did not, however, signify trust in state officials.[350] The dissent also forecasted future disharmony when states grant greater protection than that provided by the Fourth Amendment.[351] The dissent noted that a difficult question remained unanswered: whether federal officials could use state-seized evidence obtained in compliance with the Fourth Amendment but in violation of state laws that provided greater search and seizure protection.[352]

With many states granting greater protection under their state constitutions,[353] the Court again sought to draw an important line in

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[349] *Id.*

[350] Rios v. United States, 364 U.S. 206, 241 (1960) (Frankfurter, J., dissenting).

[351] *Id.* at 245-47 (Frankfurter, J., dissenting).

[352] *Id.* at 245-46 (Frankfurter, J., dissenting).

[353] Many states have granted their citizens greater search and seizure protection under their state constitutions than that provided by the Fourth Amendment. ALASKA: *see, e.g.*, State v. Jones, 706 P.2d 317, 324-25 (Alaska 1985) (determining that state constitution, ALASKA CONST. art. I, §§ 14 & 22, requires close scrutiny of warrants based on hearsay, and rejecting U.S. Supreme Court's totality of circumstances doctrine articulated in Illinois v. Gates, 462 U.S. 213, 230-31 (1983)). ARKANSAS: *see, e.g.*, State v. Sullivan, 74 S.W.3d 215, 221 (Ark. 2002) (determining that state constitution, ARK. CONST. art. II, § 15, prohibits pretextual arrests, and rejecting U.S. Supreme Court's foreclosure in Whren v. United States, 517 U.S. 806, 813 (1996), of inquires into police officers' subjective motivations when they have probable cause). CALIFORNIA: *see, e.g.*, People v. Chapman, 679 P.2d 62, 71 (Cal. 1984) (determining that, under state constitution, CAL. CONST. art. I, § 13, person had "a reasonable expectation of privacy in the unlisted information which the telephone company disclosed to the police," and impliedly rejecting U.S. Supreme Court's determination of no expectation of privacy for telephone records in Smith v. Maryland, 442 U.S. 735, 745-46 (1979)). COLORADO: *see, e.g.*, Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1059 (Colo. 2002) (determining that state constitution, COLO. CONST. art. II, § 7, requires law enforcement to have compelling need for bookstore customer's purchase records before obtaining a warrant, and rejecting U.S. Supreme Court's holding in Zurcher v. Stanford Daily, 436 U.S. 547, 565-66 (1965), that First Amendment places no special limitation on ability of government to seize expressive materials under the Fourth Amendment); People v. Mason, 989 P.2d 757, 759 (Colo. 1999) (determining that state constitution, COLO. CONST. art. II, § 7, safeguards individuals' "reasonable expectation of privacy in their personal telephone toll records and banking transaction records held by third-party banking and telephone service companies," and rejecting U.S. Supreme Court's determination of no expectation of privacy in phone records in *Smith*, 442 U.S. at 745-46, and no expectation of privacy for bank records in United States v. Miller, 425 U.S. 435, 442 (1976)). CONNECTICUT: *see, e.g.*, State v. Oquendo, 613 A.2d 1300, 1309-10 (Conn. 1992) (stating that state constitution, CONN. CONST. art. I, §§ 7 & 9, protects against unlawful attempts to take a presumptively innocent person into custody, and rejecting U.S. Supreme Court's holding in California v. Hodari D., 499 U.S. 621, 626-27 (1991), that seizure requires either physical force or submission to

the assertion of authority). DELAWARE: *see, e.g.*, Jones v. State, 745 A.2d 856, 864, 868-69 (Del. 1999) (determining that, under state constitution, DEL. CONST. art. I, § 6, officer had seized suspect who refused to comply with his orders to stop and remove his hands from his pockets, and rejecting U.S. Supreme Court's holding in *Hodari D.*, 499 U.S. at 626-27, that seizure requires either physical force or submission to the assertion of authority). HAWAII: *see, e.g.*, State v. Cuntapay, 85 P.3d 634, 641 (Haw. 2004) (stating that state constitution, HAW. CONST. art. I, § 7, guarantees short-term social guests a protected expectation of privacy and that state's plain view doctrine requires inadvertent discovery of evidence, rejecting U.S. Supreme Court's more limited expectation of privacy for home visitors as decided in Minnesota v. Carter, 525 U.S. 83, 91 (1998), and the Court's elimination of the inadvertent discovery requirement from the plain view exception in Horton v. California, 496 U.S. 128, 138-41 (1990)); State v. Lopez, 896 P.2d 889, 901 (Haw. 1995) (determining that state constitution, HAW. CONST. art. I, § 7, requires citizens to have *actual* authority over premises to legally provide consent to searches, and rejecting doctrine of apparent authority as articulated in Illinois v. Rodriguez, 497 U.S. 177, 184 (1990)). IDAHO: *see, e.g.*, State v. Guzman, 842 P.2d 660, 671-72 (Idaho 1992) (determining that state constitution, IDAHO CONST. art. I, § 17, does not have good faith exception to exclusionary rule, and rejecting U.S. Supreme Court's creation of this exception in United States v. Leon, 468 U.S. 897, 909 (1984)). INDIANA: *see, e.g.*, State v. Stamper, 788 N.E.2d 862, 867 (Ind. Ct. App. 2003) (determining that individual had constitutionally protected reasonable expectation of privacy in trash placed at curb, IND. CONST. art. I, § 11, and impliedly rejecting U.S. Supreme Court's determination in California v. Greenwood, 486 U.S. 35, 40-41 (1988), of no reasonable expectation of privacy in curbside trash); State v. Gerschoffer, 763 N.E.2d 960, 971 (Ind. 2002) (impliedly interpreting state constitution, IND. CONST. art. I, § 11, to require closer scrutiny by courts of government decisions to establish sobriety checkpoints as well as manner of conducting them, and not adopting U.S. Supreme Court's deference in evaluating sobriety checkpoints as expressed in Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990)). LOUISIANA: *see, e.g.*, State v. Tucker, 626 So. 2d 707, 713 (La. 1993) (stating that, under state constitution, LA. CONST. art. I, § 5, seizure may occur when officers create a situation suggesting an "imminent actual stop," one that is "virtually certain to result from the police encounter," and rejecting U.S. Supreme Court's determination in *Hodari D.*, 499 U.S. 621, 626-27, that seizure requires either physical force or submission to the assertion of authority) (internal quotation marks omitted). MASSACHUSETTS: *see, e.g.*, Commonwealth v. Balicki, 762 N.E.2d 290, 297-98 (Mass. 2002) (stating that under state constitution, MASS. CONST. art. XIV, plain view doctrine requires inadvertent discovery, and rejecting U.S. Supreme Court's elimination of the inadvertence requirement in *Horton*, 496 U.S. at 138-41). MICHIGAN: *see, e.g.*, Sitz v. Dep't of State Police, 506 N.W.2d 209, 210 (Mich. 1993) (determining on remand from the United States Supreme Court that state constitution, MICH. CONST. art. I, § 11, forbids sobriety checkpoints because they are warrantless and suspicionless searches and seizures, and rejecting the Court's deferential approach to sobriety checkpoints in *Sitz*, 496 U.S. at 455). MINNESOTA: *see, e.g.*, *In re* Welfare of B.R.K., 658 N.W.2d 565, 578 (Minn. 2003) (concluding that "short-term social guests" have legitimate expectation of privacy under state constitution, MINN. CONST. art. I, § 10, even if U.S. Supreme Court did not later interpret Minnesota v. Carter, 525 U.S. 83, 91 (1998), to provide one); Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183, 187 (Minn. 1997) (striking down sobriety checkpoints under state constitution, MINN. CONST. art. I, § 10, because officers lack "objective individualized articulable suspicion of criminal wrongdoing *before*" stopping a driver, and rejecting the Court's upholding of suspicionless sobriety checkpoints in *Sitz*, 496 U.S. at 455). MONTANA: *see, e.g.*, State v. Clayton, 45 P.3d 30, 34 (Mont. 2004) (determining that under state constitution, MONT. CONST. art. II, §§

10 & 11, seizure standard is whether "a reasonable person would have felt that he was not free to leave," and rejecting U.S. Supreme Court's decision in *Hodari D.*, 499 U.S. at 626-27, that seizure requires either physical force or submission to the assertion of authority); State v. Tackitt, 67 P.3d 295, 302 (Mont. 2003) (determining that state constitution, MONT. CONST. art. II, §§ 10 & 11, requires "particularized suspicion as a prerequisite for the use of a drug-detecting canine," and rejecting U.S. Supreme Court's statement in City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000), that such use did not constitute a search); State v. Hamilton, 67 P.3d 871, 876 (Mont. 2003) (determining that, under state constitution, MONT. CONST. art. II, §§ 10 & 11, person who lost wallet retained constitutionally protected expectation of privacy that prevented police from searching the wallet any more than was necessary to determine the rightful owner, and rejecting U.S. Supreme Court's doctrine that state's interest in inventory searches outweighed defendant's privacy interest as articulated in Illinois v. Lafayette, 462 U.S. 640, 645-47 (1983)); State v. Bauer, 36 P.3d 892, 897 (Mont. 2001) (determining that police officer violated state constitution, MONT. CONST. art. II, §§ 10 & 11, by arresting person "for a non-jailable offense when there [were] no circumstances to justify an immediate arrest," and rejecting U.S. Supreme Court's condoning of warrantless arrest for minor criminal offenses, such as misdemeanor seatbelt violation, in Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001)). NEVADA: *see, e.g.*, Camacho v. State, 75 P.3d 370, 374 (Nev. 2003) (determining that state constitution, NEV. CONST. art. I, § 18, requires "both probable cause and exigent circumstances for police to conduct a warrantless search of an automobile incident to a lawful custodial arrest," and rejecting U.S. Supreme Court's decision in New York v. Belton, 453 U.S. 454, 459 (1981), allowing search of automobile passenger compartment after arrest of the driver); State v. Bayard, 71 P.3d 498, 502 (Nev. 2003) (stating that under state constitution, NEV. CONST. art. I, § 18, "absent special circumstances requiring immediate arrest, individuals should not be made to endure the humiliation of arrest and detention when a citation will satisfy the state's interest," and rejecting U.S. Supreme Court's condoning of warrantless arrest for minor criminal offenses in *Atwater*, 532 U.S. at 354). NEW HAMPSHIRE: *see, e.g.*, State v. Goss, 834 A.2d 316, 319 (N.H. 2003) (determining that individual had constitutionally protected reasonable expectation of privacy in trash placed at curb, N.H. CONST. pt. I, art. 19, and rejecting U.S. Supreme Court's determination in *Greenwood*, 486 U.S. at 40-41, of no reasonable expectation of privacy in discarded trash); State v. Sterndale, 656 A.2d 409, 411-412 (N.H. 1995) (determining that under state constitution, N.H. CONST. pt. I, art. 19, citizens did not have reduced expectations of privacy in automobiles, and rejecting U.S. Supreme Court's automobile exception to warrant requirement, advanced in United States v. Ross, 456 U.S. 798, 809 (1982)). NEW JERSEY: *see, e.g.*, State v. Bruns, 796 A.2d 226, 232 (N.J. 2002) (determining that state constitution, N.J. CONST. art. I, § 7, entitles criminal defendants to challenge searches and seizures made incident to traffic stops as unconstitutional when they demonstrate a "proprietary, possessory or participatory interest in either the place searched or the property seized," and rejecting U.S. Supreme Court's reasonable expectation of privacy standard articulated in Rakas v. Illinois, 439 U.S. 128, 143 (1978)); State v. Carty, 790 A.2d 903, 912 (N.J. 2002) (holding that under state constitution, N.J. CONST. art. I, § 7, consent searches following lawful motor vehicle stops are invalid unless there was "reasonable and articulable suspicion to believe that an errant motorist or passenger has engaged in, or [was] about to engage in, criminal activity," and impliedly rejecting U.S. Supreme Court's exclusive focus in Ohio v. Robinette, 519 U.S. 33, 40 (1996), on whether valid consent had occurred); State v. McAllister, 840 A.2d 967, 975 (N.J. Super. Ct. App. Div. 2004) (stating that under state constitution, N.J. CONST. art. I, § 7, individual had constitutionally protected reasonable privacy interest in bank records, and rejecting doctrine articulated in *Miller*, 425 U.S. at 443, that bank customers do not

have a reasonable expectation of privacy in banking records). NEW MEXICO: *see, e.g.*, State v. Gomez, 932 P.2d 1, 11-12 (N.M. 1997) (determining that state constitution, N.M. CONST. art. II, § 10, requires both probable cause and exigent circumstances before conducting a warrantless automobile search, and rejecting doctrine of *Ross*, 456 U.S. at 809, that probable cause alone justifies automobile searches). NEW YORK: *see, e.g.*, People v. Scott, 593 N.E.2d 1328, 1336-38 (N.Y. 1992) (holding that state constitution, N.Y. CONST. art. I, § 12, recognizes reasonable expectation of privacy when "landowners fence or post 'No Trespassing' signs on their private property or, by some other means, indicate unmistakably that entry is not permitted," even in land outside the curtilage, and rejecting the U.S. Supreme Court's determination, Oliver v. United States, 466 U.S. 170, 178 (1984), that land outside curtilage does not benefit from occupant's privacy interests). NORTH CAROLINA: *see, e.g.*, State v. McHone, 580 S.E.2d 80, 84 (N.C. Ct. App. 2003) (determining that state constitution, N.C. CONST. art. I, § 20, does not permit good faith exception to exclusionary rule, and rejecting good faith exception doctrine of *Leon*, 468 U.S. at 909). OHIO: *see, e.g.*, State v. Brown, 792 N.E.2d 175, 178-79 (Ohio 2003) (determining that state constitution, OHIO CONST. art. I, § 14, prohibits warrantless arrests for minor misdemeanors unless one of a few stated exceptions applies, and rejecting the Court's condoning of warrantless arrests for minor criminal offenses in *Atwater*, 532 U.S. at 354). OREGON: *see, e.g.*, State v. Dixson, 766 P.2d 1015, 1022 (Or. 1988) (determining that state constitution, OR. CONST. art. I, § 9, guarantees citizens the right to be free from intrusive forms of government scrutiny, including while in the area outside an individual's curtilage, and rejecting the holding of *Oliver*, 466 U.S. at 178, that land outside the curtilage does not benefit from occupant's privacy interests). PENNSYLVANIA: *see, e.g.*, Theodore v. Delaware Valley Sch. Dist., 836 A.2d 76, 96 (Pa. 2003) (stating that state constitution, PA. CONST. art. I, § 8, affords students heightened sense of privacy that requires courts to closely examine school's need to drug test students who participate in extracurricular activities or who drive to school, and rejecting U.S. Supreme Court's finding in Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 838 (2002), that random, suspicionless drug testing did not constitute unreasonable search and seizure); Commonwealth v. Matos, 672 A.2d 769, 776 (Pa. 1996) (determining that state constitution, PA. CONST. art. I, § 8, protects against attempts to take presumptively innocent persons into custody, and rejecting requirement of *Hodari D.*, 499 U.S. at 626-27, of compliance with an officer's show of authority). TENNESSEE: *see, e.g.*, State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989) (stating that state constitution, TENN. CONST. art. I, § 7, requires warrants to meet the more heightened standard "voiced in *Aguilar* and *Spinelli*," a standard the U.S. Supreme Court replaced with the more relaxed totality of the circumstances approach in *Gates*, 462 U.S. at 230-31). UTAH: *see, e.g.*, State v. Thompson, 810 P.2d 415, 418 (Utah 1991) (determining that state constitution, UTAH CONST. art. I, § 14, protects person's "right to be secure against unreasonable searches and seizures" of his or her bank records, and rejecting doctrine of *Miller*, 425 U.S. at 443, that bank customers do not have a reasonable expectation of privacy in banking transaction records). VERMONT: *see, e.g.*, State v. Sprague, 824 A.2d 539, 541, 544-45 (Vt. 2003) (determining that under state constitution, VT. CONST. ch. I, art. 11, a "police officer must have a reasonable basis to believe that the officer's safety, or the safety of others, is at risk or that a crime has been committed before ordering a driver out of a stopped vehicle" during a "routine traffic stop," and rejecting the balancing test (between the public interest and the individual's right to be free from arbitrary police interference), articulated in Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977)). WASHINGTON: *see, e.g.*, State v. Rankin, 92 P.3d 202, 206 (Wash. 2004) (en banc) (determining that, under state constitution, WASH. CONST. art. I, § 7, officer's "mere request for identification from a passenger for investigatory purposes constitutes a seizure unless there is a

Michigan v. Long, which addressed both federal and state search and seizure protections. For the *Long* Court, federalism allowed review of state-court judgments that did not contain a "plain statement" that judgment rested on state law rather than on federal law.[354] To ban review by the Supreme Court, state courts had to clearly specify that their decisions rested on independent and adequate state grounds.[355] If ambiguity existed, the Supreme Court presumed review.[356] For the *Long* Court, federalism required a uniform view of federal law.[357] By contrast, the dissent interpreted the *Long* rule as ignoring the sovereignty of the states.[358] Ultimately, the *Long* rule, coupled with the Burger Court's narrowing of Fourth Amendment protections, gave state courts a clear means for shielding their decisions from review, namely, using the required plain statement.

Despite safeguarding its interpretive turf in construing and applying both the Fourth Amendment and its exclusionary rule, the Court has, at times, invoked modern state search and seizure practices in evaluating Fourth Amendment issues beyond the question of incorporation. When the Court canvassed state practices during the incorporation debate, it did so in light of the standards it created, examining the meaning of "liberty" and later considering what was "fundamental to the American scheme of justice."[359] By contrast, when the Court has cited modern state police practices, it has selectively used them to project meaning onto the Fourth Amendment.[360] Even though no coherent theory can explain when the Court will invoke current state practices to define the contours of the Fourth Amendment, an examination of those cases in which the Court has invoked modern state practices reveals both its selective deference to current practices and an implicit need for guidance in assessing and promulgating sound policing practices.

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reasonable basis for the inquiry," and rejecting the Court's doctrine that no seizure occurs when officers request, as opposed to demand, answers to questions, articulated in United States v. Mendenhall, 446 U.S. 544, 553-54 (1980)). WEST VIRGINIA: *see, e.g.*, State v. Perry, 324 S.E.2d 354, 357-59 (W.Va. 1984) (determining that in some circumstances state constitution, W. VA. CONST. art. III, § 6, requires officers to give arrested motorists opportunity to make "an alternative disposition" of their vehicles to avoid searches of their contents during impoundment, and rejecting possible limitations arising from U.S. Supreme Court's inventory-search doctrine, established in South Dakota v. Opperman, 428 U.S. 364, 372-73 (1976)).

[354] Michigan v. Long, 463 U.S. 1032, 1042 (1983).

[355] *Id.*

[356] *Id.*

[357] *Id.* at 1040.

[358] *Id.* at 1068 (Stevens, J., dissenting).

[359] *See supra* Part I.A.

[360] *See supra* Part III.

Sometimes the Court has sought to support its Fourth Amendment interpretation by citing the practices of a majority of states and sometimes the Court has pointed to a purported "trend" in state practices.[361] By contrast, the Court has also looked to the practice of a minority of states to create a new investigatory power for states.[362] In short, the Court's citation of modern state statutes suggests a rhetorical deference to state search and seizure practices.

Several of these decisions have established important search and seizure rules. In *United States v. Watson*, the Court upheld the power to arrest without a warrant when a felony has occurred in an officer's presence, even in the absence of exigent circumstances.[363] The Court used current state practices, which were consistent with the common-law rule, to undercut its decisions that had expressed a strong preference for warrants.[364] And Justice Powell cited the wisdom of "law enforcement agencies" to support the arrest rule.[365] Similarly, the Court in *Payton v. New York* used "contemporary norms and conditions" to undermine a common-law rule, as it decided that an officer needed an arrest warrant to enter a suspect's home.[366] At one point, the Court described an evolving standard for the Fourth Amendment: it rejected the idea that the common law had "simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage."[367]

By contrast, the Court in *Tennessee v. Garner* construed state law and municipal practices as rejecting a common-law rule.[368] By limiting police officers' authority to use deadly force, the Court explained that many states and cities had indicated that such limits did not interfere with their interest in effective law enforcement.[369] In short, while limiting authority, the Court rhetorically constructed a "trend" that appeared harmonious with states' and cities' self-imposed restrictions.

Other recent Fourth Amendment decisions also reveal the Court's continued interest in state practices. In *Atwater v. City of Lago Vista,* the Court listed statutes from all states, using these state practices to uphold an officer's discretionary authority to arrest for

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[361] *See supra* Part III.A & Part III.C.
[362] *See supra* Part III.B.
[363] United States v. Watson, 423 U.S. 411, 423-24 (1976).
[364] *Id.* at 419.
[365] *Id.* at 430 (Powell, J., concurring).
[366] Payton v. New York, 445 U.S. 573, 591 n.33 (1980).
[367] *Id.*
[368] Tennessee v. Garner, 471 U.S. 1, 14 (1985).
[369] *Id.* at 19.

fine-only traffic offenses.[370] To justify its determination, the Court showed tremendous deference to state legislatures, suggesting that it was not interested in seriously questioning a state's authority to decide the circumstances in which officers may arrest individuals for committing offenses subject to a fine-only penalty. For example, the *Atwater* Court explained that the Washington Metro Transit Authority had permitted a District of Columbia police officer to arrest a person for "eating french fries" in a subway station, but noted that the Authority had changed its policy to provide for citations.[371] In 2004, after *Atwater*, the Authority arrested a person "for chewing the last bite of her candy bar after she walked through the fare gates."[372] Even though the arresting officer was exercising federal authority, the *Atwater* decision nonetheless broadly supported a legislative body's decision to grant arrest authority.

The Court in *Hiibel v. Sixth Judicial District Court* similarly expanded state police power, but this time by citing the practices of a minority of states. The Court upheld a state's authority to compel a suspect to disclose his name during an investigatory stop.[373] The Court noted that the state had the power to convict for obstruction of an officer's duty when a suspect refused to disclose his name. To sustain this power, the Court characterized the legal duty to disclose as arising from two state statutes: one statute required suspects to tell officers their names during investigatory stops,[374] and the other provided criminal penalties for obstruction.[375] The Court listed state statutes that contained specific name disclosure references, whether during investigatory stops or as an element of the criminal offense of loitering.[376] The Court never mentioned the plethora of state obstruction statutes—a new possible source for this duty to disclose one's name—nor the frequency of their discretionary use (as with the arrest and obstruction charge of eighty-six year old television reporter Mike Wallace for his driver's parking violation[377]).

These Fourth Amendment cases reveal the Court's selective invocation of current state laws, whether used to expand or limit state

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[370] Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001).

[371] *Id.* at 353 n.23.

[372] Lyndsey Layton, *Mouthful Gets Metro Passenger Handcuffs and Jail*, WASH. POST, July 29, 2004, at A1.

[373] Hiibel v. Sixth Judicial Dist. Court, 124 S. Ct. 2451, 2461 (2004).

[374] *Id.* at 2455-56.

[375] *Id.* at 2456.

[376] *Id.*

[377] *See* Joshua Robin, *City Probe on Wallace Cuffing*, NEWSDAY (N.Y.), Aug. 27, 2004, at A10; Associated Press, *NYC Mayor to Probe Arrest of Mike Wallace* (Aug. 11, 2004).

power. Only rarely has the Court explained their relevance. In *Garner*, the Court stated that canvassing modern practices helped it to assess the gravity of law enforcement interests—to strike the best balance of interests under the Fourth Amendment for determining when officers may reasonably use deadly force. And, in *Atwater*, the Court used current state statutes to show states' adherence to a broad common-law arrest power. The *Atwater* Court also impliedly used these modern statutes to indicate the wisdom of state officials, who had only rarely used their arrest powers for petty offenses.

The Court's interest in current state policing practices and its turf-protecting *Long* decision in part resemble the struggle of state courts interpreting their own states' constitutions. Some state courts have looked outside their states to give meaning to their own constitutions, a process known as "horizontal federalism." As with the Supreme Court, these state courts have final authority to interpret their constitutions. These state courts understand and hold fast to their sovereignty, recognizing that even if the language of their constitutions mirrors the language of the United States Constitution, they remain free to create new interpretations. Other state courts, still maintaining their sovereignty, have declared that their constitutions provide no greater protection than that provided by the federal Constitution. These state courts have adopted a "lockstep" interpretive approach. In short, independent sovereign courts, both federal and state, have looked outside their constitutions for interpretive guidance.

The difficulty of constitutional interpretation—how to give meaning to a text not designed to be a code of regulations—may in part explain the Supreme Court's interest in current state laws. The Court, however, has selectively invoked these modern laws, at times trusting the wisdom of state legislatures and sometimes mistrusting them. In the end, the Court's vacillating trust and mistrust of state legislatures and courts suggests an evolving standard of reasonableness for Fourth Amendment issues, one reflecting a peculiar kind of "Fourth Amendment federalism."